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THE NEW CONSTITUTIONAL LAW OF KENYA:

PRINCIPLES, GOVERNMENT AND HUMAN RIGHTS



MORRIS KIWINDA MBONDENYI
AND
JOHN OSOGO AMBANI

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NEW CONSTITUTIONAL LAW OF KENYA

Principles, Government and Human Rights

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Principles, Government and Human Rights

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PREFACE

When Kenya attained her independence on 12 December 1963, the British Government bequeathed the implements of power to the sprouting African leadership by dint of the Kenya Independence Act and the Kenya Independence Order in Council of 1963. The Independence Constitution was set out in the Second Schedule of the Order in Council. The document was long, detailed and complex. Among other features, it notably articulated a bicameral parliamentary system of government (consisting the Senate and House of Representatives), independent institutions, liberal multi-party democracy, human rights protection (mostly civil and political rights), and devolution of powers to the regions – the *majimbo system*.

The emergence of the independent State revived the hopes and aspirations of the African masses, which were at the time impoverished and taken aback by the brutish British colonial legacy. This was especially so because political power had passed from the hands of colonialists to indigenous leaders who were expected to understand and appreciate the problems of their people. It was equally expected that the ‘lost glory’ and traditional values that had been undermined by colonialism would be restored, of course with some reforms meant accommodate the socioeconomic and political diversity of the country. This, however, turned out not to be the case. Instead, the emergent State adopted a constitution and legal system similar to that of her former colonizer, notwithstanding the fact that the borrowed model could not adequately redress the challenges of the people.

In addition, the new constitutional dispensation was inadequate to deschool a State long underpinned by a vibrant tradition of violence and usurpations complemented by tested implements of oppression – security agencies and the provincial administration. It is also instructive that the pre-independence period did not sufficiently expose natives to democratic governance given that the British introduced representative institutions too late to alter the established character of the colonial State. Thus, it was naïve to expect of the new governors democratic leadership; having

served pupillage under the repressive colonial system. This is perhaps why President Kenyatta elected to bring the fairly progressive constitutional provisions at per with the largely authoritarian and malignant State by effecting regrettable changes to the Independence Constitution. Within no time, the devolved system was replaced by a centralized and authoritarian administration, multi party politics paved way for single party and personalized dictatorship, the bicameral representative parliament yielded ground for a malleable National Assembly, among other retrogressive changes. Ojwang (in *Constitutional development in Kenya: Institutional adaptation and social change* (1990)), has tabulated these amendments succinctly thus:

PARTICULARS OF THE CONSTITUTIONAL AMENDMENT	EFFECT OF THE AMENDMENT
The Constitution of Kenya (Amendment) Act, No 28 of 1964	Established Republican status, with President as Head of State Abolished the Office of the Prime Minister, vesting significant powers in the President making him Head of State and Government and Commander in Chief of the Armed Forces
The Constitution of Kenya (Amendment) (No 2) Act, No 38 of 1964	Was largely procedural and concerned with change of designations Vested powers in the presidency Substantially weakened the quasi-federal structure (regionalism), especially with regard to sources of funding
The Constitution of Kenya (Amendment) Act, No 14 of 1965	Abrogated the special entrenchment of certain provisions of the Constitution Made constitutional amendment subject to 65 percent majority vote in both Houses of Parliament Relaxed some of the provisions concerning emergency powers

The Constitution of Kenya (Amendment) Act, No 16 of 1966	Instituted certain controls with regard to Members of Parliament Increased powers vested in the presidency with regard to the civil service
The Constitution of Kenya (Amendment) (No 2) Act, No 17 of 1966	A follow-up to the significant political decisions made at the Limuru KANU Conference
The Constitution of Kenya (Amendment) (No 3) Act, No 18 of 1966	Further relaxation of restrictions on emergency power
The Constitution of Kenya (Amendment) (No 4) Act, No 40 of 1966	Amalgamation of the two Houses of the National Assembly Creation of 41 new constituencies for the former Senators Postponement of dissolution of the first Parliament from 1968 to 1970
The Constitution of Kenya (Amendment) Act, No 14 of 1967	Response to the outflow from the operation of the Constitution of Kenya (Amendment) (No 2) Act, No 17 of 1966
The Constitution of Kenya (Amendment) (No 2) Act, No 45 of 1968	Changed the method of presidential election, replacing Parliament's role with direct election Sanctified the constitutional role of parties in elections and proscribed independent candidature Further relaxed the limitations on emergency powers
The Constitution of Kenya (Amendment) Act, No 5 of 1969	Declared to be 'the Constitution of Kenya and to be the authentic version thereof' Consolidated the various amendments so far made Vested increased powers in the presidency, with regard to the electoral commission
The Constitution of Kenya (Amendment) Act, No 2 of 1974	Made Kiswahili the official language of the National Assembly
The Constitution of Kenya (Amendment) (No 2) Act, No 10 of 1974	Changed voting age from 21 to 18

The Constitution of Kenya (Amendment) Act, No 1 of 1975	Repealed the Constitution of Kenya (Amendment) Act No 2 of 1974 Provided for the use of both Kiswahili and English in Parliament, for various purposes
The Constitution of Kenya (Amendment) (No 2) Act, No 14 of 1975	Added to the President's prerogative of reprieve, cases of disqualification from civic rights, on account of having been convicted of an election offence (Election Offences Act)
The Constitution of Kenya (Amendment) Act, No 13 of 1977	Abrogated the jurisdiction of the Court of Appeal for East Africa replacing it with the Kenya Court of Appeal Amended section 75 of the Constitution with regard to the right of remission abroad of property compensation monies

According to Odhiambo-Mbai ('The rise and fall of the autocratic State in Kenya' in W Oyugi, P Wanyande & C Odhiambo Mbai *The politics of transition in Kenya: From KANU to NARC*), these reviews were aimed at entrenching autocracy or personal rule in the country. Indeed, the amendments succeeded in substantially defacing the Independence Constitution in the process establishing an authoritarian State that lasted close to four decades. This is why, since independence, Kenyans have been subjected to political regimes that have purported to implement democracy and human rights within the context of violence, intimidation, corruption and a general lack of transparency and accountability. Such a context could only encourage continued plundering of public resources, human rights violations of profound proportions as well as flagrant abuse of State institutions. In the process of such experimentation, Kenyans have unabatedly been denied the equal enjoyment of many of their fundamental rights and freedoms. Consequently, a persistent theme in Kenya's constitutional history has been the question of how to establish a constitutional regime that can guarantee fair political participation and development for all of its ethnic groups. Clearly, if the Independence Constitution was inadequate as a socio-political transformation tool, it was made worse by the frequent and

often hurried constitutional amendments that commenced shortly after independence.

The dawn of a new era

On 27 August 2010, on the promulgation of the 2010 Constitution, a new chapter was opened in Kenya's constitutional history. Given the backdrop described above, the 2010 Constitution seeks to re-orient the country by establishing a robust institutional and normative framework for good democratic governance amenable to the exercise of human rights.

This book, *The new constitutional law of Kenya: principles, government and human rights*, is tailored to unveil to the reader the fundamental normative and institutional frameworks of Kenya's new Constitution. Not only does the book define key concepts in constitutional law generally, but it also details how government in Kenya has been restructured and re-organised to give effect to the traditional principles that form the basis of constitutional law. The golden thread that cuts across the various chapters of the book is the emphasis that good constitutions anchor certain tenets that have garnered recognition as hallmarks of democratic dispensation. These hallmarks include the concept of separation of powers; the doctrine of the rule of law; constitutionalism and human rights. As is clearly documented and explained in this book, all these attributes have been secured by the 2010 Constitution. We hope therefore to contribute to the new promise by making the Constitution accessible through breaking down and contextualising its stipulations.

However, it is important to point out that this book is not a complete commentary on the 2010 Constitution. Perhaps, an appropriate title would have been 'high constitutional law of Kenya'. This is because we major on the critical and traditional pillars of the constitution, namely, principles, government organs (executive, legislature and judiciary), devolution and human rights. Yet, the 2010 Constitution offers more than these. It, for instance, has provisions on leadership and integrity, land and natural resources, public finance management, amongst others, which are not discussed in depth in our publication.

In conclusion, we ought to mention some of the significant debts incurred in the course of this exercise. Our creditors fall under the following broad categories:

- The students at Moi University School of Law, Catholic University of Eastern Africa and African Nazarene University who helped shape the original thinking on this quite entailing subject;
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Finally, just to register our disappointment that our friend, colleague, officemate, and fellow constitutional scholar, Steve Odera, did not live slightly longer to see this book.

M Kiwinda Mbondenyei and J Osogo Ambani

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LIST OF ABBREVIATIONS

AG	Attorney-General
APRM	African Peer Review Mechanism
CAAU	Constitutive Act of the African Union
CAT	Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment
CCPR	International Covenant on Civil and Political Rights
CEC	County Executive Committee
CEDAW ..	Committee on the Elimination of all forms of Discrimination Against Women
CESCR	International Covenant on Economic Social and Cultural Rights
COVAW	Caucus for Women Leadership and Coalition on Violence Against Women
CRC	Convention on the Rights of the Child
CREAW	Centre for Rights Education and Awareness
DC	District Commissioner
DEVAW	Declaration on the Elimination of Violence Against Women
DPP	Director of Public Prosecutions
EU	European Union
FIDA	Federation of Women Lawyers
ICJ	International Commission of Jurists
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IEBC	Independent Electoral and Boundaries Commission
ILO	International Labour Organisation
JSC	Judicial Service Commission
KACA	Kenya Anti Corruption Authority
KADU	Kenya Africa Democratic Union
KANU	Kenya African National Union
MP	Member of Parliament
NGOs	Non-Governmental Organisations
NHRIs	National Human Rights Institutions

NPC	Nigerian National Petroleum Company
OAU	Organisation of African Unity
PC	Provincial Commissioner
PSC	Public Service Commission
SAHRC	South African Human Rights Commission
SPDC.....	Shell Petroleum Development Corporation
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNESCAP.....	United Nations Economic and Social Commissions for Asia and the Pacific
UNHCHR	United Nations High Commission for Human Rights
USA	United States of America
WILDAF	League of Kenya Women Voters, Women in Law and Development in Africa

CHAPTER 1

WHAT IS A CONSTITUTION?

Wade and Bradley supply two meanings to the term constitution – a limited and wider definition. In the narrow conception of the word,

A constitution means a document having a special legal sanctity which sets out the framework and the principal functions of the organs of government within the state, and declares the principles by which those organs must operate.¹

In this sense, states with written constitutions such as the United States of America (USA)² and the Republic of South Africa³ have a constitution. Similarly, Kenya, by virtue of the 2010 Constitution⁴ could boast of having a documented constitution. As expounded in the above excerpt, the 2010 Constitution occupies a special place in the legal system in that it is supreme and overrides all other rules, customs and policies.⁵ The document enjoys the sanctity of the law. It also binds all organs of state and individuals.⁶ It puts in place a number of organs and institutions, assigns them values and responsibilities and coordinates their relations. The organs established are: the legislative,⁷ the executive,⁸ the judicature,⁹ and

1 AW Bradley & K Ewing (eds) *Constitutional and administrative law* (1994) (11th edition) 4.

2 Adopted on 17 September 1787 by the Constitutional Convention in Philadelphia, Pennsylvania.

3 Act 108 of 1996.

4 Constitution of Kenya, promulgated on 27 August 2010; Revised Edition 2010, Published by the National Council for Law Reporting with the Authority of the Attorney General. It is however instructive that the Speaker of the National Assembly has ruled that until the dissolution of the Coalition Government, 'the dichotomy between the Constitution and the National Accord and Reconciliation Act is not real' and further that 'the two are read as one'. See, Communication from the Chair, dated 28 April 2008. This means the Act must be read as part of the Constitution.

5 Article 2(1).

6 Article 20(1).

7 Chapter Eight.

8 Chapter Nine.

9 Chapter Ten.

devolved governments.¹⁰ Kenya's supreme law however, does more than install organs of state. It declares the sovereignty of the people¹¹ and the Republic;¹² it makes certain prescriptions on citizenship;¹³ and guarantees human rights.¹⁴

Going by the above narrow conception, the United Kingdom of Great Britain and Northern Ireland has no constitution. This is because,

There is no single document from which is derived the authority of the main organs of government, such as the Crown, the Cabinet, Parliament and the courts of law. No single document lays down the relationship of the primary organs of government one with another, or with the people.¹⁵

In the broader sense of the term 'constitution' however, the UK, just like Kenya, has a constitution. This approach, exemplified by Bolingbroke, defines the constitution thus:

By Constitution, we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason... that compose the general system, according to which the community hath agreed to be governed.¹⁶

This broad understanding appreciates that no single document in a legal system can fully explain government and its operations. The constitution of any state thus has to be sought from the constitutional document (where there is one in existence), key Acts of Parliament, judicial decisions (where the doctrine of *stare decisis* is in vogue), and constitutional convention. Also referred to as the 'positive morality of the constitution',¹⁷ 'a binding rule, a rule of behavior accepted as

10 Chapter Eleven.

11 Article 1.

12 Article 4.

13 Chapter Three.

14 Chapter Four.

15 Bradley & Ewing (n 1 above).

16 A Bolingbroke *dissertation upon parties* (1733), quoted in Bradley & Ewing (n 1 above).

17 J Austin *The province of jurisprudence determined*, page 259. Cited in Bradley & Ewing (n 1 above) 259.

obligatory by those concerned in the working of the constitution',¹⁸ or the 'unwritten maxims of the constitution',¹⁹ amongst others, constitutional conventions are central components of a constitution. The description given by Dicey of them is apt:

Conventions, understandings, habits or practices which, though they may regulate the conduct of the several members of the sovereign power... are not in reality laws at all since they are not enforced by the courts.²⁰

Full discovery of the constitution of the modern democracy has also to take into consideration certain regular and well-established constitutional principles like supremacy of constitution (where the written constitution is superior), rule of law, separation of powers, constitutionalism, and the protection of fundamental human rights and liberties. In the case of *Rev Dr Timothy Njoya and 6 others v The Attorney General and 3 others*,²¹ Ringera J (as he then was) was alive to the reality of the constitution beyond its letter. According to the, then, High Court judge, the Constitution:

[i]s a living instrument with a soul and consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles.²²

In like manner, in *Crispus Karanja Njogu v Attorney General*, a three-judge bench of the High Court held:

Constitutional provisions must be read to give values and aspirations of the people. The court must appreciate throughout that the Constitution, of necessity, has principles and values embodied in it; that a Constitution is a living piece of legislation. It is a living document.²³

Ringera J enumerated the values and principles that breathe life into the letter of the constitution as follows:

-
- 18 See KC Wheare *Modern constitutions* (2nd edition) (1966), cited in N Parpworth *Constitutional and administrated law* (3rd edition) 236.
 - 19 Mill, *Representative government*, ch 5, cited in Bradley & Ewing (n 1 above) 19.
 - 20 AV Dicey *Law of the constitution*, page 24, cited in Bradley & Ewing (n 1 above) 19.
 - 21 *Njoya and 6 others v Attorney General and 3 others* (No 2). [2008] 2 KLR.
 - 22 (N 21 above) 277.
 - 23 Criminal Application number 39 of 2000.

And what are those values and principles? I would rank constitutionalism as the most important. The concept of constitutionalism betokens limited government under the rule of law. Every organ of government has limited powers, none is inferior or superior to the other, none is supreme: the Constitution is supreme and they all bow to it. I would also include the thread that runs throughout the Constitution – the equality of all citizens, the principles of non-discrimination. The doctrine of separation of powers is another value of the Constitution. And so is the enjoyment of fundamental rights and freedoms. Those, to my mind, are the values and principles of the Constitution to which a court must constantly fix its eyes when interpreting the Constitution.²⁴

24 (N 21 above) 277.

CHAPTER 2

WHY THE CONSTITUTION?

It is hardly probable that states author constitutions for the fun of it. Neither is it tenable that by enacting constitutions, legal systems simply emulate a credo. Quite to the contrary, constitutions generally aim at achieving certain conventional ends. A critical and traditional purpose of constitutions is to constitute the state. It is constitutions that describe how the polity is governed as well as the character of the respective government machinery. In so doing, constitutions delineate state power. Usually, power is dispersed to three organs of state, namely; the executive; the legislative and the judicature. Modern constitutions are putting in place other institutions with autonomy, functions and powers that rival these three traditional organs. An example of such organ in the 2010 Constitution is the Kenya National Human Rights and Equality Commission and affiliate national human rights institutions.²⁵ There is an entire chapter on constitutional commissions and independent offices²⁶ institutions with sufficient independence and State authority.

CONSTITUTION, HUMAN RIGHTS AND CONSTITUTIONALISM

But as the modern constitution allocates and defines state power, it also tends to limit it for the sake of securing fundamental human rights and liberties for the individual and groups. It is, indeed, becoming increasingly difficult to fathom a constitution without a Bill of Rights. While initially the Bill of Rights mainly contained what have been called first generation rights (civil and

25 See article 59. This institution is entrusted by the Constitution with profound functions which include: To act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights; to investigate any conduct in state affairs, or in any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice; and to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.

26 Chapter 15, 2010 Constitution.

political rights),²⁷ recent Constitutions have broadened their scope to include second generation rights (socio-economic rights), and third generation rights (such as environmental rights).²⁸ The 1996 Constitution of South Africa has a Bill of Rights with justiciable social and economic rights, still, a very unique development.²⁹ A scholarly contribution has in fact ranked this Constitution as ‘the most sophisticated and comprehensive system for the protection of socio-economic rights of all constitutions in the world today.’³⁰ As demonstrated elsewhere in this book, Kenya’s 2010 Constitution has complied with this trend, and might have fared even better. It has, in addition, innovated constitutional protection of the rights of special groups like youth,³¹ older members of society,³² and persons with disabilities.³³ These entitlements have mainly been the subject of international human rights law and hardly the domains of constitutional law. Also conspicuously gracing Kenya’s Bill of Rights is the protection of consumer rights,³⁴ another novelty in constitutional law.

Constitutions limit government by, amongst others, establishing the rule of law, separating powers and functions of state, ensuring checks and balances and providing for participatory and responsive governance based on the ideals of democracy and good governance.

27 It is trite that on attainment of independence, the British bequeathed unto their colonies Constitutions with Bill of Rights that hardly provided for more than civil and political rights akin to those provided for in the Magna Carter. Kenya’s independence (as well as the repealed) constitution properly fits this description.

28 According to a traditional categorization of human rights, ascribed to the French jurist Karel Vasak, human rights unveiled at different epochs. First to be ascertained were what are now called ‘first generation’ rights. They are also referred to as civil and political rights. Then arose ‘second generation’ rights, or economic and social rights. The human rights discourse, according to this nomenclature, has lately witnessed yet another ‘generation’ of rights termed ‘group rights’ or ‘third generation’ rights. See, for instance, JD van der Vyver ‘The doctrine of human rights: Its historical and philosophical foundation’ in D Brand *et al* (eds.) *From human wrongs to human rights* (1995) 49.

29 Other states with a justiciable set of social and economic rights are Hungary, Lithuania, Portugal, and Sri Lanka.

30 D Brand ‘Introduction to socio-economic rights in the South African Constitution’ in D Brand & C Heyns in *Socio-economic rights in South Africa* (2005) 1.

31 Article 55.

32 Article 57.

33 Article 54.

34 Article 46(1).

The now well-established art of limiting government is what is referred to as 'constitutionalism'. Nwabueze is in agreement that:

It is this limiting of the arbitrariness of political power that is expressed in the concept of constitutionalism. Constitutionalism recognizes the necessity of government but insists upon a limitation being placed upon its powers. It connotes in essence therefore a 'limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law'.³⁵

Indeed:

Constitutionalism is the idea that government should derive its powers from a written constitution and that its powers should be limited to those set out in the constitution.³⁶

It follows that written constitutions are conceived as condition precedents for the practice of constitutionalism. This is why Okoth-Ogendo considered it a paradox as well as a dilemma that in Africa – at the material epoch of review – it was possible to talk of 'constitutions without constitutionalism'.³⁷ The stunning revelation by this writer of constitutions devoid of constitutionalism was thus forcefully articulated:

For that purpose, it is necessary to recall the primary elements of that paradox: namely, commitment to the idea of the constitution, and rejection of the classical notion of constitutionalism.³⁸

CONSTITUTIONS AND DEMOCRACY

For understandable reasons, constitutions are vital for democracy.³⁹ Good constitutions generally anchor certain unanimous tenets that have garnered recognition as hallmarks of a democratic dispensation.

35 BO Nwabueze *The constitution in the emergent states* (1972) 1.

36 I Curie & J de Waal *The bill of rights handbook* (2005) 8.

37 HWO Oketh-Ogendo 'Constitutions without constitutionalism: Reflections on an African political paradox' in Issa Shivji (ed.) *State and Constitutionalism: An African Debate on Democracy* (1991) 6.

38 Oketh-Ogendo (n 37 above).

39 It is important to note that the term democracy has often eluded description. George Orwell correctly observes that 'in the case of a word like democracy, not only is there no agreed definition but the attempt to make one is restricted from all sides'. See G Orwell *Selected essays* (1957) 149.

These are: a free press, multi-party politics, regular free and fair elections, freedom of expression and a vibrant civil society. There are still other ideals without which democracy is not considered defined. These include: The concept of separation of powers; the doctrine of the rule of law; constitutionalism and fundamental civil liberties. All these attributes have been secured by the 2010 Constitution and many other progressive constitutions like the Constitution of South Africa. It is crucial to reckon however, that democracy is more than these legally alterable attributes. As Adedeji has pointed out,

[D]emocracy cannot be decreed. Unlike instant coffee, there is no instant democracy. You cannot move from totalitarianism to democratic practice from one day to another ... Democracy is more than just the ballot boxes, the political parties and all the institutional trappings. It is a way of life.⁴⁰

CONSTITUTIONS AND GOOD GOVERNANCE

Just like democracy, good governance also relies on constitutions for anchorage. Good governance has the following major characteristics: it is governance that is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law.⁴¹ It has sustainable development as its end. Again, these attributes are usually protected by the Constitution.

CONSTITUTIONS, DIRECTIVE PRINCIPLES AND THE REPUBLIC

Modern constitutions also set the national psyche and tempo by stipulating directive principles of state policy or national values of State as is the case with the 2010 Constitution.⁴² This nascent feature is, perhaps, also one of the most salient aspects of India's constitution.⁴³ It was apparently 'borrowed from the Constitution of Ireland which

40 A Adedeji 'Sustaining democratic rule for Nigeria' economic growth and development' (A paper presented at a special address at the 32nd annual general meeting of the Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture, held at Lagos 1993).

41 This definition is according to the United Nations Economic and Social Commissions for Asia and the Pacific (UNESCAP) – www.unescap.org/huset/gg/governance. Accessed on 24 April 2006.

42 For the Kenyan case, see generally, article 10. See the chapter on directive principles.

43 See Part IV of India's Constitution.

had copied it from the Spanish Constitution'.⁴⁴ Constitutional instruments have equally been seized to declare republican or other kindred status, restate the international law principle of sovereignty of state⁴⁵ and uphold the emerging inviolability of the concept of the sovereignty of the people.⁴⁶ It is largely these broad ends that constitutions generally and invariably serve.

44 JN Pandey *Constitutional law of India* (1997) 299.

45 According to article 4 of the 2010 Constitution, 'Kenya is a sovereign Republic'. The stipulation of sovereignty of state may be tautological as it is an established international law principle.

46 The 2010 Constitution commences by providing at article 1: 'All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution'.

CHAPTER 3

THE 2010 CONSTITUTION IN THE CLASSIFICATION OF CONSTITUTIONS

A seminal academic work on Kenya's repealed constitution conveyed the two major reservations on the exercise of classifying constitutions.⁴⁷ The first reservation arises because the different constitutions are at the very bottom 'a reflection of the main social, economic and political concerns of the particular countries' and a compromise between the socio-economic, political and cultural forces that are responsible for their creation.⁴⁸ It would therefore follow that attempting uniform taxonomy of all constitutions may easily be arbitrary and an exercise in futility. The other reservation is that a constitution ordinarily does not offer everything about the system of government it seeks to constitute. There often are other vital rules in a legal system without which it is impossible to classify or describe the system of government in question. As Wheare fittingly observes,

A constitution itself... is only a part of the rules that make up a system of government, and any category into which a constitution may be placed may be rendered unreal or inadequate by the study of the actual working of the system of government.⁴⁹

Thus, it would be dishonest or irresponsible, by mere reference to the constitutional instrument, to make all conclusions regarding the constitutional law of a particular state.

In spite of these preliminary and convincing observations, it is considered here that constitutions tend to share certain principal attributes even where they are informed by different circumstances. This explains why it is usually possible to attempt a nomenclature of world's major constitutions. The major classifications of constitutions

47 JB Ojwang *Constitutional development in Kenya: Institutional adaptation and social change* (1990) 221.

48 K Loewenstein 'Constitutions and constitutional law in the West and in the East' *Indian* (1969) *Journal of Political Science* 30.

49 See Wheare (n 18 above) 32.

are: Written v unwritten; rigid v flexible; parliamentary v presidential; unitary v federal; republican v monarchical; supreme v subordinate and secular v religious. Autochthony is also a criterion, the basis upon which constitutions may be classified.

Written v unwritten

With the exception of Britain, New Zealand and Israel, all countries of the world (including Kenya) have a single document called the constitution, which contains the major principles of government. Given this scenario, Ojwang has faulted this method of classification arguing that it is 'stilted in so far as it places virtually all the countries of the world on one side of the scales, and only three countries on the other side'.⁵⁰

A constitutional document is generally thought to represent the constitutional law of the state notwithstanding the question discussed above that no single deed however lengthy can encapsulate the totality of these rules.⁵¹ The narrative is different in countries with unwritten constitutions. In these jurisdictions there exists no single document representing substantial constitutional law. These constitutions are normally gleaned from scattered legislative enactments often supplemented by a significant body of conventions and usages.⁵²

Rigid v flexible

A rigid constitution is one, which requires a special method of amendment of any of its provisions.⁵³ As a general rule, flexible constitutions are changed by lesser complex procedures than those described as rigid. This is not to say that in practice flexible constitutions are altered or amended easily and often. It is only to state that the process of effecting changes in such constitutions has less conditionality. Britain, though with an unwritten tradition,

50 Ojwang' (n 47 above) 222.

51 According to Pandey, the Indian Constitution is the lengthiest and the most detailed of all the written Constitutions of the world. After the 78th Amendment Act, 1995, the Constitution contained 443 Articles, divided into 26 Parts and 12 Schedules.

52 Ojwang' (n 47 above) 222.

53 Pandey (n 44 above) 26.

offers a typical case of a flexible constitution because of the operative principle of parliamentary supremacy. Under this scheme, Parliament is not limited in what it can alter, amend or repeal and there are no 'untouchable' or 'higher' norms (with the exception, recently, of certain dictates of European Community law) beyond the reach of the Legislature. Parliament, in other words, has 'the right to make or unmake any law whatever...'⁵⁴

In many countries with written constitutions the contemporary trend appears to be to make it procedurally difficult to change the provisions. In Kenya, for instance, amending certain sections of the constitution requires special majorities in legislative authorities, and for others, it takes a referendum to effect. Two kinds of amendments require special majorities in national or county legislative bodies. One, Bills initiated by Parliament and which require two thirds majority in both houses to pass⁵⁵ and, two, proposals by popular initiative supported by at least one million registered voters, approved by a majority of county assemblies and passed by Parliament.⁵⁶

Amendments requiring a referendum to effect include those relating to the following matters: supremacy of the Constitution; territory of Kenya; sovereignty of the people; national values and principles of governance; the Bill of Rights; term of office of the President; independence of the Judiciary and commissions and independent offices; functions of Parliament; objects, principles and structure of devolved government; and the chapter on amendment of the Constitution.⁵⁷ A proposed amendment shall be considered approved by a referendum only if at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and the amendment is supported by a simple majority of the citizens voting in the referendum.⁵⁸

54 AV Dicey *The law of the constitution*, pages 39 – 40, as cited Bradley & Ewing (n 1 above) 69.

55 Article 256(1)(d).

56 Article 257.

57 Article 255(1).

58 Article 255(2).

Parliamentary v presidential

The classification under review ‘addresses itself to the mode of distribution of power within the governmental organ’ and ‘the basic reference is the principle of the separation of powers’.⁵⁹ The constitutions of Britain and USA, respectively, exemplify parliamentary and presidential systems. An outstanding attribute of the former model is the fact of government in Parliament. Key government officials – members of Cabinet – are drawn from the legislature and constantly operate from there to respond to the questions and expectations of peoples’ representatives. Policy formulation in this form of government while guided by the executive has the regular input and scrutiny of parliamentarians. Another example of a parliamentary constitution is India’s of which it has been written,

The Constitution of India establishes a parliamentary form of government both at the Centre and the States ... The essence of the Parliamentary form of Government is its responsibility to the Legislature. The President is the constitutional head of the State. The real executive power is vested in the Council of Ministers whose head is the Prime Minister. The Council of Ministers is collectively responsible to the Lower House, i.e., Lok Sabha.⁶⁰

In the USA, on the other hand, clear separation of powers and functions is adhered to and the President is allowed executive powers. The President is elected directly by the people for a fixed term – 4 years. This system does not favour government officials’ presence in the legislature or any obvious fusion of powers. As discussed elsewhere in this book, Kenya’s 2010 Constitution designs a presidential system whereby a popularly elected President exercises executive authority and neither (s)he or any other member of the Executive is drawn from or sits in Parliament. Further, powers are almost strictly separated and buttressed by a system of checks and balances.

⁵⁹ Ojwang’ (n 47 above) 226.

⁶⁰ Pandey (n 44 above) 23 – 24.

Unitary v federal v confederal

Another way of classifying constitutions is as unitary or federal. Unitary constitutions tend to be strong at the centre often without replica sub-national authorities in the hinterlands. Usually, the centralized power is resided in the legislature, executive and judiciary. The quest for democracy in the Third World has however tallied with the rejection of overly concentrated forms of government. Indeed,

...The popular demand for power-sharing between the centre and the sub-units in the national territorial system has in the recent years reached a crescendo, thereby constituting the quest for decentralized governance virtually into a movement. The decentralization movement in these societies is one about the need for the disengagement of the sub-national units of government from many years of central control.⁶¹

Kenya's 2010 Constitution has heeded this call by decentralizing power to 47 county authorities.⁶² But the devolution strategy adopted is not sufficient to establish proper territorial units capable of federating with the centre. What exists in Kenya is a quasi-federal system⁶³ that decentralizes or devolves certain powers to counties with the following objects, to:

- promote democratic and accountable exercise of power;
- foster national unity by recognising diversity;
- give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- recognise the right of communities to manage their own affairs and to further their development;
- protect and promote the interests and rights of minorities and marginalised communities;

61 W Oyugi 'Search for an appropriate decentralization design in Kenya: Historical and comparative perspectives' in K Kindiki & O Ambani (eds.) *The anatomy of Bomas: Selected analyses of the 2004 Draft Constitution of Kenya* (2005) 58.

62 Chapter Eleven on Devolved Government.

63 It is important to note however that the Supreme Court sees the new dispensation as a unitary system. In *Re the Matter of the Interim Independent Electoral Commission* [2011] eKLR it is ruled: 'and it is clear to us that an interdependence of national and county governments is provided for – through a devolution-model that rests upon a unitary, rather than a federal system of government'.

- promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- ensure equitable sharing of national and local resources throughout Kenya;
- facilitate the decentralization of State organs, their functions and services, from the capital of Kenya; and
- enhance checks and balances and the separation of powers.⁶⁴

The central government retains critical functions such as conduct of foreign affairs, foreign policy and international trade; the use of international waters and water resources; immigration and citizenship; the relationship between religion and state; national defence and the use of the national defence services; police services, including — the setting of standards of recruitment, training of police and use of police services; criminal law; and correctional services; courts; national economic policy and planning; monetary policy, currency, banking (including central banking); universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions among others.⁶⁵

A federal constitution would ordinarily share power between the central government and independent territorial units. Where the central government is almost co-ordinate with the state authorities, as in the USA, the system qualifies as a proper federation. Where the central government is far more powerful than territorial authorities the arrangement is called quasi-federal. Canada and India are other examples of quasi-federations. In a confederation, the territorial units have more authority concentrated in them than at centre. The USA was a confederation before the passing of the 1787 Constitution.

Supreme v subordinate

This nomenclature has to do with the position of the constitution in the hierarchy of valid norms. It also refers to Parliament's capacity to make or unmake laws, including the constitution. In countries with

64 Article 174.

65 Schedule Four, 2010 Constitution.

written constitutions, it is common to find the constitution ranking over and above all other norms. In these systems, norms contradicting the constitution would be declared invalid or unconstitutional even when passed by Parliament. Where this is the case, the constitution is supreme and everything else including its amendment or repeal has to follow its provisions. This is what has obtained in Kenya since independence and more especially under the new dispensation.⁶⁶

A subordinate constitution, on the other hand, can be changed easily, usually with less complex procedures. Many times, Parliament is authorised to change just any constitutional provision without much restraint. Britain's unwritten constitution easily fits in this sub-cluster.

Republican v monarchical

Whether a system is regarded as republican or monarchical depends on the location and status of 'the people' in the architect of power. In a republic, the people play a central role in governance largely for two reasons. One it is they who emanate the authority which the leaders exercise on their behalf.⁶⁷ And, two, government is meant to serve their welfare.⁶⁸ The essence of republicanism, it follows, is self-determination and self-rule. James Madison conceptualized this form of government in the following manner:

If we resort for a criterion to different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of the society, not from any inconsiderable proportion, or a favoured class of it; otherwise a handful of tyrannical nobles, exercising their aggressions by a delegation of their powers, might aspire to the rank of republican and claim for their government that the persons administering it be

⁶⁶ See section on the supremacy of the constitution in this book.

⁶⁷ JM Kangu 'The social contractarian conception of the theory and institution of governance' (2007) 2 *Moi University Law Journal* 31.

⁶⁸ Mutakha-Kangu (n 67 above).

appointed, either directly or indirectly, by the people; and that they hold appointments by either of the tenures just specified...⁶⁹

On the flipside of this coin is monarchism. In a monarchy, the people are peripheral. They have a limited role in deciding their leaders and in most cases power is inherited among the privileged class. Monarchical systems have been fading away according to some accounts 'owing firstly to the decline in monarchical government and secondly to major changes to monarchical constitutions, which have made most remaining monarchs largely symbolic and ceremonial'.⁷⁰ Kangu may therefore be vindicated in arguing that both in origin and nature; governance is republican and always should be based on republicanism.⁷¹ Kenya provides a lively example of a diminished monarchy. Between 12 December 1963 and 12 December 1964, the Constitution was theoretically a monarchy because the British Queen played a critical role through the Governor-General who was then the Head of State.⁷² Kenya's 2010 Constitution entrenches a republic in which all sovereign power belongs to the people.⁷³ The people may exercise their sovereign power either directly or through their democratically elected representatives.⁷⁴

Secular v religious

A secular constitution recognizes no religion as its own.⁷⁵ It treats all religions equally.⁷⁶ The converse is true about religious constitutions. The precise nature of Kenya's 2010 Constitution, in this regard, may be somewhat problematic. While the Constitution states categorically that there is no State religion,⁷⁷ it could still be argued that the legal system, viewed in its totality, makes preference for certain religious principles or practices. For instance, both the Preamble and national

69 James Madison, Federalist Paper, number 39.

70 Ojwang (n 47 above) 227.

71 Mutakha-Kangu (n 67 above).

72 Ojwang (n 47 above) 227.

73 Article 1(1).

74 Article 1(2).

75 Pandey (n 44 above) 23.

76 As above.

77 Article 8.

emblems make express reference to ‘God’ perhaps implying that the State is at least not atheistic.

AUTOCHTHONY AND THE 2010 CONSTITUTION

For the purpose of analysing Kenya’s independence constitution, Ghai and McAuslan defined an autochthonous constitution as one “which does not trace its validity to any British legislation, but is ‘home grown’, ‘rooted’ in the country itself”.⁷⁸ An autochthonous constitution is therefore one, which is written by the local populace or their representatives and reckons or reflects their unique experiences and circumstances. Such a constitution rests on the bedrock of a localized legal system founded on obtaining traditions and values. In this sense, Kenya’s independence constitution was, especially during its formative years, not strictly autochthonous – its own interpretation having been governed by the English Interpretation Act of 1889, ‘as it applies for the purpose of interpretation and in relation to the Acts of the Parliament of the United Kingdom’.⁷⁹ This tendency of constitutional systems to stand on borrowed ideas and structures is no longer recommended. Nyerere, for instance, forcefully registered his disapproval as follows:

We refuse to adopt the institutions of other countries even where they have served those countries well because it is our conditions that have to be served by our institutions. We refuse to put ourselves in a straight-jacket of constitutional devices – even of our own making. The constitution of Tanzania must serve the people of Tanzania. We do not intend that the people of Tanzania should serve the constitution.⁸⁰

In the Harare Commonwealth Declaration, Commonwealth Heads of Government Recognized that developing appropriate ‘institutional structures which reflect national circumstances’ is a key element for promoting and protecting human rights, good governance and the rule of law.⁸¹

78 YP Ghai & JPWB McAuslan *Public law and political change in Kenya* (1970) 216.

79 Section 147(15) of the Independence Constitution. The reference to the English Interpretation Act was not included in the Constitution Act (1969). See Ghai & McAuslan (n 78 above) 215.

80 As cited in Okoth-Ogendo (n 37 above) 6.

81 See, J Hatchard, M Ndulo & P Slinn *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 208.

There is thus need to enact realistic constitutions that have their respective contexts in contemplation. In many critical respects, the 2010 Constitution is autochthonous. This is because a substantive part of its prescriptions are reflective of past experiences. Mere mention of certain such articles rekindles memories of historical constitutional problems, sometimes very bitter ones. For instance, the 2010 Constitution limits the number of cabinet secretaries the President may appoint,⁸² an apparent panacea to the situation at the time of enacting the Constitution when the Coalition Government had the largest Cabinet since independence. The Constitution also requires that the President be sworn at a public place,⁸³ a clear solution to a past experience when, amid protests over a rigged election, the President was secretly and hurriedly sworn in later in the day at his official residence. Unprecedented scales of violence erupted in certain parts of the country soon thereafter. These unfortunate experiences had to be eschewed in the new constitutional order.

82 Article 152.

83 Article 141(1).

CHAPTER 4

SOURCES OF LAW

The phrase ‘source of law’ implies many things. It could denote the two divergent methods of creating general norms – ‘enactment, a purposeful creation brought about by central organs; and custom, an unwitting, decentralized creation by way of the legal parties themselves’.⁸⁴ ‘Source of law’ may also signify the ultimate basis of the validity of the legal system.⁸⁵ In the broadest sense, however, ‘source of law’ signifies every legal norm, in so far as it yields a legal obligation or a legal right.⁸⁶ While all these nuances are accurate, it is more in the latter sense that the phraseology is applied here. The proper questions for which answers are sought herein include: What are the sources of law in Kenya? Where are they found? What validates them? What is their hierarchy, if any?

According to HLA Hart, every developed legal system has at its foundation, the ‘rule of recognition’ that is normally used to identify those other rules that are valid as law.⁸⁷ Thus, to say that a given rule is valid is to recognise it as passing all the tests provided by the rule of recognition. Where the rule of recognition provides the criteria by which the validity of other rules of the system are assessed, then it is an ultimate rule.⁸⁸ Where ‘there are several criteria ranked in order of relative subordination and primacy one of them would usually be supreme’.⁸⁹ Going by this methodology, the rule of recognition in Britain is what the Queen in Parliament enacts as law.⁹⁰

84 H Kelsen *Introduction to the problems of legal theory* (1992) (trans LB Paulson & LS Paulson) 67.

85 As above.

86 As above.

87 See HLA Hart *The concept of law* (1961) 92 – 93.

88 Hart (n 87 above) 102 – 104. Unlike other rules that are assessed on the basis of the ultimate rule, the later rule has ‘no rule providing criteria for the assessment of its own legal validity’.

89 Hart (n 87 above) 102.

90 Hart (n 87 above) 104.

For where there is a legislature subject to no constitutional limitations and competent by its enactments to deprive all other rules of law emanating from other sources of their status as law, it is part of the rule of recognition in such a system that enactment by that legislature is the supreme criterion of validity.⁹¹

Carey has argued the introduction of this concept is Hart's most important contribution to jurisprudence.⁹² In Kenya's context however, locating the precise rule of recognition may not be obvious. Such an endeavor is likely to prove problematic for neither is Parliament sovereign nor is the Constitution conclusive in enumerating all valid norms. Nonetheless, there arguably are two candidates for such status – the Constitution and the Judicature Act.⁹³ These could be indicative of what applies as valid norms in our legal system.

THE 2010 CONSTITUTION AS A RULE OF RECOGNITION

The 2010 Constitution in many important respects identifies and validates certain legal norms. In the first place it declares its own supremacy as well as its binding character throughout the Republic.⁹⁴ The Constitution is so cardinal that its validity or legality is beyond challenge by or before any institution.⁹⁵

This supreme document vests legislative authority in Parliament⁹⁶ meaning that Acts of Parliament are equally valid norms. Not only is legislative authority vested in Parliament, in fact, only Parliament has the power to make provision having the force of law in Kenya except where such authority is conferred by the Constitution or legislation to other institutions.⁹⁷ Other legal norms may emanate from county governments in the form of county legislation.⁹⁸ The

91 Hart (n 87 above) 103.

92 SV Carey 'What is the rule of recognition in the United States' (2008-2009) 157 *University of Pennsylvania Law Review* 1163.

93 Chapter 8, Laws of Kenya.

94 Article 2(1).

95 Article 2(3).

96 Article 94(1).

97 Article 94(5).

98 Article 185(1).

Constitution recognizes that a county assembly may make any laws that are necessary for the effective performance of the functions and exercise of the powers of the county government.⁹⁹

Constitutional stipulations also provide for the application of customary law although this norm, like all others, is valid only to the extent that it is not inconsistent with the Constitution.¹⁰⁰ The Constitution contemplates traditional dispute resolution mechanisms¹⁰¹ and these systems thrive on African customary law. Culture, often a breeding ground for African customary law, is also recognised as the foundation of the nation and the cumulative civilization of the Kenyan people and nation.¹⁰² Although given room to operate, African customary law is wrought with a number of limitations even at the constitutional level. Besides the constraint discussed above,¹⁰³ Article 50(2)(n) of the Constitution stipulates that no one shall be tried for a criminal offence unless it amounts to an offence under the laws of the State or under international law. This provision alone has the effect of rendering the entire African customary criminal law invalid. This is because African traditions have no written laws and even then only recognized formal legislative structures are allowed to enact criminal law. This implies that the entire corpus of African traditional offences is dead save for those individual traditional crimes that have secured legislative articulation. It is instructive that African societies had many crimes, which were handled by local people according to traditional norms. These crimes are no longer acknowledged given the supremacy of the Constitution and Parliament in the penal realm. The third way in which the Constitution restricts customary law is through certain subtle provisions whose overall effect is to sideline traditional practices. An example of such clause is one in the Bill of Rights requiring that the youth be 'protected from harmful cultural practices'.¹⁰⁴ Among the harmful traditions from which the youth

99 Article 185(2).

100 Article 2(4).

101 Article 159(3).

102 Article 11(1).

103 Article 2(4).

104 Article 55(d).

are to be protected, obviously, are practices such as female genital mutilation, a central custom in many African traditions. Moreover, traditional dispute resolution mechanisms may not to be used in a way that – (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with the Constitution or any written law.

Another related source of law is Islamic customary law and religion. This norm may apply to the extent of qualifying constitutional equality provisions to allow for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion in matters relating to personal status, marriage, divorce and inheritance.¹⁰⁵

Arguably, the legal system also has a place for common law, which is the law created by the decisions of judges in recognising some customs and not others.¹⁰⁶ The applicability of common law or judge-made law is evidenced by the operation of the doctrine of judicial precedent. In clear and unambiguous terms, the 2010 Constitution provides that all lower courts are bound by the decisions of the Supreme Court.¹⁰⁷ The designation of certain courts as superior and others as *subordinate* may be supplementary testimony to the validity of judge-made law¹⁰⁸ for at the core of the doctrine of judicial precedent is a hierarchical court system.

The 2010 Constitution further recognizes that rules and regulations enacted administratively form part of the law-making enterprise. For instance, the Bill of Rights envisions that the Chief Justice (CJ) shall make rules providing for the court proceedings.¹⁰⁹ As Kelsen has argued,

General norms stemming from an administrative agency rather than from parliament are characterized as regulations, and they either

105 Article 24(4).

106 The definition of common law is borrowed from, C Elliott & F Quinn *English legal system* (2009) 111.

107 Article 163(7).

108 See article 162.

109 Article 22(3).

carry out or take the place of statutes. Such regulations are also called statutory instruments.¹¹⁰

International legislation in the new dispensation

For the first time since independence, there is express constitutional recognition of general rules of international law¹¹¹ as well as international instruments (mainly treaties) ratified by the State.¹¹² General rules which may have acquired the force of law include the principles of sovereign equality of states; territorial integrity; customary international law; *puncta sun savanda*; amongst others. Kenya is party to a number of treaties, which also qualify as valid norms in the newly structured legal system.¹¹³ But it is likely the human rights and environmental law international instruments, such as those in the table below, that might be felt most.

African Union Human Rights Instruments

Name of Treaty	Date when Acceded	Date when Signed
African Charter on Human and Peoples' Rights	23 January 1992	10 February 1992
African Charter on the Rights and Welfare of the Child	25 July 2000	10 August 2000

¹¹⁰ Kelsen (n 84 above) 66.

¹¹¹ Article 2(5).

¹¹² Article 2(6).

¹¹³ Kenya has however, not signed or ratified the following key universal human rights treaties: Convention on the Prevention and Punishment of the Crime of Genocide; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Optional Protocol to the International Covenant on Civil and Political Rights; Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; Amendments to Articles 17(7) and 18(5) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the amendments are not yet in force); Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty; and the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

Protocol on the Statute of the African Court of Justice and Human Rights	4 February 2004	18 February 2005
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	17 July 2003	

United Nations Human Rights Instruments

Name of Treaty	Date When Acceded	Date When Signed
Universal Declaration of Human Rights	<i>Not a treaty</i> – amounts to soft law	<i>Not a treaty</i> – amounts to soft law
International Covenant on Civil and Political Rights	1 May 1972	23 March 1976
International Covenant on Economic, Social and Cultural Rights	1 May 1972	–
International Convention on the Elimination of All Forms of Racial Discrimination	13 September 2001	–
Convention on the Elimination of All Forms of Discrimination against Women	9 March 1984	–
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	21 February 1997	–
Convention on the Rights of the Child	26 January 1990	30 July 1990

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-	-
Convention on the Rights of Persons with Disabilities	30 March 2007	19 May 2008
Convention on the Status of Refugees	13 November 1981	-

That both international law rules and treaties have the force of law is now more than before accent. What may remain unclear is whether the new system provides for a dualist or monist dispensation. Dualism is the flipside of the coin that is monism of which it has been written:

In ‘monist’ states, following French constitutional law, once a treaty has been ratified and published ‘externally’, it becomes part of internal law. At least in theory, no legislative action is needed to lower the second storey level of international law norms to the ground floor level of national law.¹¹⁴

On the other hand, the dualist doctrine ‘is based upon the perception of two quite distinct systems of law’, operating separately, and holding that ‘before any rule or principle of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically “transformed” into municipal law.’¹¹⁵ Viljoen concurs that international law and national law are fundamentally different in a dualist legal system and ‘domestic law-making (enabling legislation) is required to “transform” or “incorporate” (“domesticate”) international law into national law’.¹¹⁶ By ‘transformation’ is meant the ‘amendment of existing laws or the adoption of new domestic legislation’ in line with a ratified treaty.¹¹⁷ The process of ‘incorporation’ entails the wholesale inclusion of an international instrument in national law.¹¹⁸ For most of Commonwealth Africa, the

¹¹⁴ F Viljoen *International human rights law in Africa* (2007) 531.

¹¹⁵ MN Shaw *International law* (1997) 104.

¹¹⁶ Viljoen (n 114 above) 18.

¹¹⁷ As above.

¹¹⁸ As above.

concept of dualism thrives. Under dualism, treaties are not counted as part of municipal law until transformation or incorporation has occurred. The aim is to put check on executive prerogatives so that only those treaties solemnized by national legislative structures have legal effect. This is in tandem with the system of parliamentary sovereignty, 'which has been developed as a cherished bulwark against the exercise of executive prerogatives'.¹¹⁹ Loveland argues that this position is 'entirely consistent with the traditional Diceyan theory' and is 'the political outcome of the 1688 revolution'.¹²⁰ The rationale for this doctrine is written in Britain's own history, thus:

The 1688 revolution produced an agreement between William of Orange and Parliament which provided that the constitutional role of the King's government was to govern within the laws made by Parliament. The government itself could not create new laws simply by coming to an agreement with foreign countries. If one allowed that to happen, one would essentially be saying that it is government rather than Parliament that is the sovereign law-maker, as the government could bypass the refusal of the House of Commons and/or the House of Lords to consent to its proposed laws.¹²¹

It follows then that, at least in the common law, 'when new obligations are created by treaty, legislation is needed for them to become rules of national law'.¹²²

The original judicial authority for this principle (dualism) in Kenya was expressed in the case of *Okunda v Republic*¹²³ where the High Court limited the sources of law in Kenya to those listed under the Judicature Act.¹²⁴ The Court held that international law; not being one of the listed sources then, was not an independent force of law. Unless domesticated through either a constitutional

119 Viljoen (n 114 above) 535-536. See, Bradley & K Ewing (n 1 above) 326.

120 I Loveland *Constitutional law, administrative law and human rights: A critical introduction* (2006) 35.

121 As above.

122 Bradley & Ewing (n 1 above) 326.

123 [1970] EA 512.

124 Section 3(1), Chapter 8, Laws of Kenya.

amendment or an Act of Parliament, international law had no legal effect in Kenya.

In a 2001 case, *Pattni and another v Republic*,¹²⁵ the High Court, again, established that international norms, much as they could be of persuasive value, were not binding in Kenya save for where they would be incorporated into the Constitution or other written laws. While making reference to the Universal Declaration of Human Rights (UDHR),¹²⁶ the International Covenant on Civil and Political Rights (CCPR)¹²⁷ and the African Charter on Human and Peoples Rights (African Charter),¹²⁸ Githinji, Osiemo and Otieno JJ ruled that:

Although those instruments testify to the globalization of fundamental rights and freedoms of an individual, it is our Constitution as a law which is paramount. That is not to say, however, that Court (*sic*) cannot in appropriate cases, take account of emerging international consensus of values in this area.¹²⁹

While the Court conceded some ground in the latter decision by demonstrating willingness to 'take account of emerging international consensus of values' in the human rights realm, this apparently could only happen 'in appropriate cases' bearing in mind that at all times the Constitution is paramount.

Three verifying questions have been suggested to test the extent to which international human rights norms have been domesticated in African states: First, whether international human rights norms are part of domestic law; second, where such norms feature in the hierarchy of the municipal national legal order, in case they are applicable; and third, whether domestic courts apply them in their decisions.¹³⁰

125 [2001] eKLR 262.

126 Adopted and proclaimed by the UN General Assembly in resolution 217A (III) of 10 December 1948.

127 Adopted by the UN General Assembly in resolution 2200A (XXI) of 16 December 1966; entered into force on 23 March 1976; acceded to by Kenya on 1 May 1972.

128 Adopted by the OAU in Nairobi, Kenya, in June 1981 and entered into force in October 1986. Ratified by Kenya on 10 February 1992.

129 Page 262.

130 Viljoen (n 114 above) 530.

The two precedents discussed above indicate that prior to the 2010 Constitution there was a genuine temptation on the part of Kenyan courts to answer the first question in the negative. According to this view international human rights norms did not form part of Kenya's domestic legal order. Norms enacted outside Kenya first had to go through either the process of incorporation or transformation to have legal effect municipally. This could be illustrated by the transformation of the Convention on the Rights of the Child¹³¹ and the African Charter on the Rights and Welfare of the Child into Kenyan law.¹³² In this regard, the Children Act is:

An Act of Parliament to... give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes.¹³³

Even though international human rights norms generally did not have automatic legal influence, in some instances, courts referred to them.¹³⁴ The Court of Appeal (then the highest court) in the case of *Mary Rono v Jane Rono* recognized that courts, could apply both customary international law and treaty law even in the absence of implementing legislation, 'provided that there is no conflict with existing state law'.¹³⁵ In this sense, courts relied on these norms as 'an aid to interpretation' of either the Constitution or ordinary laws ('interpretative guidance') but not 'as the basis of a remedy'.¹³⁶ Waki JA recognised this utility:¹³⁷

131 Adopted by the UN General Assembly in resolution 44/25 of 20 November 1989. Entered into force on 2 September 1990.

132 OAU Doc CAB/LEG/25 9/49 (1990). Adopted in Addis Ababa, Ethiopia in July 1990 and entered into force on 29 November 1999.

133 See, Preamble. Cf *Wambua v Wambua* (2004) AHRLR 189 (KeHC 2004); *SO v LAM* [2009] eKLR, civil appeal 175 of 2006, Court of Appeal, 30 January 2009.

134 In addition to the cases discussed here see also eg *Kenya v Minister For Home Affairs and others, ex p Leonard Sitamze*, First instance, Miscellaneous Civil Case 1652 of 2004; ILDC 1094 (KE 2007), 18 April 2007; *Lemeiguran and others v Attorney General of Kenya and others*, First instance (by way of Originating Summons), Misc Civil Application number 305 of 2004; ILDC 698 (KE 2006); (2006) eKLR, 18 December 2006.

135 (2005) AHRLR 107 (KeCA 2005) paragraph 22.

136 See generally Viljoen (n 114 above) 540.

137 Para 24.

I have gone at some length into international law provisions to underscore the view I take in this matter that the central issue relating to discrimination which this appeal raises, cannot be fully addressed by reference to domestic legislation alone. The relevant international laws which Kenya has ratified, *will also inform my decision*. [Emphasis added].

In a subsequent 2008 decision, *Re The Estate of Lerionka Ole Ntutu (Deceased)*,¹³⁸ KH Rawal J took occasion to explain that the position arrived at in the *Rono* decision was inevitable given principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms, which states:

It is within the proper nature of the judicial process and well established functions of national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – *for the purpose of removing ambiguity or uncertainty from national constitution – legislation or the common law*.

The reliance on Bangalore Principles further illustrates that courts were in some instances willing to be influenced even by soft law provisions.

In the *RM v AG* case,¹³⁹ Nyamu and Ibrahim JJ were of the view that courts ought to apply international norms only in instances where they were not in conflict with municipal law. According to the judges:¹⁴⁰

Where the national law is clear and inconsistent with the international obligation, in common law countries, the national court is obliged to give effect to national law. And in such cases the court should draw such inconsistencies to the attention of the appropriate authorities since the supremacy of the national law in no way mitigates a breach of an international legal obligation which is undertaken by a country...

It follows that the place of international human rights norms, prior to the enactment of the new Constitution, was beneath the Constitution (which is paramount), lower than ordinary state laws, and, perhaps, at best, could be useful where legislation is in

138 (2008) eKLR.

139 *RM v Attorney-General* (2006) AHRLR 256 (KeHC 2006).

140 Paragraph 22.

abeyance or in removing ambiguities or uncertainty from municipal legislation.

As stated above, international law owes its recent basis in the legal system to Articles 2(5) and 2(6) of the 2010 Constitution. While courts have, in the cases of *David Macharia v Republic*¹⁴¹ and *Beatrice Wanjiku and another v Attorney General and another*,¹⁴² explicitly stated that Kenya has transited from the previous dualist doctrine, the judicial officers failed to clarify whether the State has effectively become a monist state. In the case of *Kenya Section of the International Commission of Jurists v Attorney General and others* (2011), Justice Ombija extensively relied on international law instruments but could not address the theoretical basis for their application. Outside the courts, it has severally been postulated that Kenya is now a monist state. In his 'Keynote Speech for the Africa and International Law Conference' in 2012, for instance, the CJ, Dr Willy Mutunga, explicitly expressed the view that Kenya now subscribes to monism.

Monism regards international and domestic legal systems being part of a single legal order. However, that is not the only element defining monism. Kelsen states that in a monist system, either the domestic law or the international law has complete supremacy over the other.¹⁴³ There are, therefore, two forms of relationships in a monist set up. The first is based on the supremacy of international law over all domestic laws, including the constitution. The second is premised on the concept of the superiority of all domestic law over any conflicting right or obligations that arise from the international legal regime. Kelsen further argues that it is the domestic law (for instance, the constitution), which offers guidance on which law, between international and domestic law, is to have supremacy within the monist system.¹⁴⁴

However, the 2010 Constitution does not define the place of international law within the hierarchy of norms that constitute the legal system, but only expresses the supremacy of the Constitution over all other laws, including international law (Articles 2(1) and

141 eKLR 2011.

142 eKLR 2012.

143 H Kelsen, *Principles of International Law*, second edition, page 580.

144 Kelsen (n 143 above) 565 – 566.

2(4)). Since international law will interact with domestic laws at various levels within the legal system, and neither the international nor the domestic legal regime has complete supremacy, it seems inappropriate to brand the Kenyan system as a monist one. The theory of harmonization hence provides the best theoretical and practical explanation for the application of international law in Kenya in the post 2010 Constitution context.

Among the proponents of the theory of harmonization is one of the leading South African international law scholars, John Dugard. Dugard and his collaborating authors argue that the theory of harmonization arose as a modification to monism, upon the realization that international law could not supersede all domestic laws, especially basic ones such as the constitution.¹⁴⁵ Consequently, the theory of harmonization is premised on the idea that international law is part of national law and, *ipso facto*, does not require transformation or incorporation for utilization in the domestic courts. The theory, however, is careful to clarify that neither international law nor domestic law has clear-cut supremacy over the other. International law is, thus, hierarchically placed somewhere between domestic norms within the legal system. The theory of harmonization advances that should a conflict occur between international and domestic laws, the domestic judge should adhere to his jurisdictional rules in order to address the inconsistency.

While courts have cited international legal instruments in post-2010 judgments, they have not clarified the position of such rules within the hierarchy of norms. Thus far only the supremacy of the Constitution over international law has been affirmed beyond doubt for instance in the *Beatrice Wanjiku* case. With this settled there remains the prominent question whether international instruments supersede or are inferior to Acts of Parliament, in case of a conflict of rights or obligations arising from the two sources of law. An analysis of the inconsistencies in the post-2010 Constitution seems to have enhanced, rather than addressed, the contradictions. In *Re Zipporah Wambui Mathara*¹⁴⁶ and *David Njoroge Macharia v Republic* cases, the respective High Court judges supported the supremacy of

145 J Dugard, *International Law: A South African Perspective*, third edition, p.47 – 48.

146 [2010] eKLR.

international law instruments over conflicting statutory provisions, only for judge Majanja in the *Beatrice Wanjiku* case to endorse a more superior role for statutory provisions.

In the *Zipporah Wambui* case, perhaps the first to cite international legal instruments in the post-2010 Constitution context, Justice Koome took the view that provisions of the 1966 CCPR supersede clauses of the Civil Procedure Act and Rules on committal to civil jail for persons who fail to settle a debt. The Court stated that committal to civil jail as provided under the Civil Procedure Act would ‘punish, humiliate and subject the debtor to shame and indignity...’. The judicial officer went on to imply that such statutory provisions were inconsistent with the CCPR, which ‘guarantees parties basic freedoms of movement and of pursuing economic, social and cultural development.’ The position adopted by Koome J was subsequently reaffirmed in the Njoroge Macharia precedent which further underscored that ‘provisions of the CCPR superseded those’ of a Kenyan statute.

In *RPM v PKM* (2011), a subsequent precedent, Justice GBM Kariuki seemed to refine that although one ought not be committed to civil jail if (s)he is unable to fulfill a contractual obligation, the system may be activated where one is unwilling to settle a debt, despite his ability. Majanja J reestablished this approach of differentiating between a judgment-debtor who is unable and one who is unwilling in the *Beatrice Wanjiku* case. In this case, the judge convincingly argued that the use of the phrase ‘merely’ in Article 11 of CCPR implies that a person should not be ‘imprisoned for the sole reason of inability to fulfill a contractual obligation’. Article 11 of CCPR provides that no person should be ‘imprisoned merely on the ground of inability to fulfill a contractual obligation.’ The judge instructively went on to advance that the provision signifies that ‘additional reasons other than inability to pay should exist for one to be imprisoned.’ The judge thus justified his reliance on the Civil Procedure Act and Rules on the fact that there was no inconsistency between the provisions of Article 11 of CCPR and the statutory provisions on committal to civil jail where one was merely unwilling to settle a debt despite the ability.

However, the judgment in the *Beatrice Wanjiku* case went on to undermine the position of international law in relation to statutory provisions, with the judge stating that in the particular case, the provisions of CCPR were, 'at best an interpretative tool.' The judge was also of the view that the drafters of the 2010 Constitution would not 'have intended that international conventions and treaties should be superior to local legislation and take precedence over laws enacted by their chosen representatives under the provisions of article 94' of the 2010 Constitution. The implication of such pronouncement is that it takes away the supremacy granted to international law (in its relationship with statutory provisions) in the preceding cases of *Zipporah Wambui* and *David Macharia*. The precedent also enhances inconsistencies on the position of international law in the hierarchy of norms in the continuing harmonization of the legal system by the courts.

The subjugation of international law in relation to statutory provisions could contribute to regression, by courts, to the previous practice during the earlier dualist period. As discussed above, before the enactment of the 2010 Constitution, Kenyan courts applied international law restrictively, and only in situations in which they were not inconsistent with Kenyan statutory provisions. The regrettable implication of the previous approach was that the application of the more progressive international human rights regime was relegated. International instruments related to human rights protection have often evolved at a faster rate than domestic legislation. In fact, a number of national legislations related to human rights protection had the effect of domesticating rights and obligations already established under international instruments. Therefore, it seems that for Kenyans to gain optimum benefits from the more progressive international human rights system, courts have an obligation to affirm and apply international law in a more progressive and vigorous manner. The entry of international law norms might require judges of superior courts to urgently develop a consistent philosophy regarding their application. A time has come for the judiciary to evolve certain and predictable rules addressing the questions of the hierarchy of valid norms, the position of international law in this set up and whether Kenya's legal system is monist or dualist. In addition, Parliament must

hasten the enactment of legislation directing the treaty ratification process. Such a law should for instance say whether the authority of Parliament is required before the ratification of an international instrument or whether the Executive retains such prerogatives. Otherwise, confusion of unprecedented proportions will reign for at the core of any functional legal system is smooth interaction of valid legal norms complete with undisputed hierarchy.

JUDICATURE ACT AS A RULE OF RECOGNITION

The other possible rule of recognition is section 3(1) and (2) of the Judicature Act which enumerates the following as valid legal norms:

(1)

The Constitution;

Subject thereto, all other written laws ...;

Subject thereto and so far as those written laws do not extend or apply, the substance of the Common Law, the Doctrines of Equity and the Statutes of General Application enforced in England on the 12th August 1897 and the procedure and practice observed in courts of justice in England at that date; but the Common Law, Doctrines of Equity and Statutes of General Application shall apply so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

This list adds to that in the Constitution additional norms, to wit, doctrines of equity and statutes of general application in force in England on the date specified, norms whose validity may now hang in the balance. Positions may in the future differ as to whether these norms will continue to be relevant even without constitutional protection. Questions may equally be asked about the new hierarchy

of valid norms. Thus, it might prove extremely difficult to justify influential jurisprudential statements such as the following,

The legal system is not, then, a system of like-ordered legal norms, standing alongside one another, so to speak; rather, it is a hierarchical ordering of various strata of legal norms. Its unity consists in the chain that emerges as one traces the creation of norms, and thus their validity, back to other norms, whose own creation is determined in turn by still other norms. This regress leads ultimately to the basic norm – the hypothetical basic rule – and thus to the ultimate basis of validity, which establishes the unity of this chain of creation.¹⁴⁷

147 Kelsen (n 84 above) 63 – 64.

CHAPTER 5

SOVEREIGNTY OF THE PEOPLE

The concept of sovereignty of the people comprises three elements; (i) the power to constitute a frame of government, (ii) the power to choose those to run the government, and (iii) the powers involved in governing.¹⁴⁸ The 2010 Constitution seizes the earliest opportunity to enunciate this principle. Its first substantive article alludes to the above three attributes. The first clause establishes that sovereign power exists and is to be exercised in accordance with the Constitution.¹⁴⁹ Its contours are therefore constitutionally delineated hence realizable only in the stipulated manner. Sovereign power is exercised by the people either directly or through democratically elected representatives¹⁵⁰ and is evidenced by the very Preamble to the Constitution.¹⁵¹ The power is delegable and in this case to – Parliament and the legislative assemblies in the county governments; the national Executive and the executive structures in the county governments; and the Judiciary and independent tribunals.¹⁵² Finally, the Constitution guarantees that sovereign power is alive at both national and county levels of government.¹⁵³

People's sovereign power as an express constitutional item is however, a novelty in Kenya. It is not to say that prior to the 2010 Constitution the people lacked this ability. Quite to the contrary, in *Njoya and 6 others v Attorney General and 3 others (Njoya case)*,¹⁵⁴ the High Court found that sovereign power is an inherent entitlement that precedes the constitution itself. It is the power that midwives the constitution. According to Justice Ringera:

148 BO Nwabueze Presidentialism in Commonwealth Africa (1974) 292.

149 Article 1(1).

150 Article 1(2).

151 Preambular paragraph 7 reads: '...EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution...'

152 Article 1(3).

153 Article 1(4).

154 (2008) 2 KLR.

If the makers of the Constitution were to expressly recognize the sovereignty of the people and their constituent power, they would do so only *ex abundanti cautela* (out of excessiveness of caution). Lack of its express textualisation is not however conclusive of its want of juridical status.¹⁵⁵

It follows that sovereign power is to be inferred even in the absence of express constitutional articulation. If this view is accepted, then the people of Kenya have always possessed the power to write their constitution directly or through representatives chosen by them for that particular purpose. This is possible because of the fact of their being sovereign which status accords them the attendant constituent power. Inferring people's sovereignty from a constitutional provision that declared the Republic sovereign,¹⁵⁶ Justice Ringera ruled:

With respect to the juridical status of the concept of the constituent power of the people, the point of departure must be an acknowledgement that in a democracy, and Kenya is one, the people are sovereign. The sovereignty of the Republic is the sovereignty of its people. The Republic is its people, not its mountains, rivers, plains, its flora and fauna or other things and resources within its territory. All Government power and authority is exercised on behalf of the people. The second stop is the recognition that the sovereignty of the people necessarily betokens that they have a constituent power – the power to constitute and/or reconstitute, as the case may be, their framework of Government. That power is a primordial one. It is the basis of the creation of the Constitution and it cannot therefore be conferred or granted by the Constitution and of course, it need not be.¹⁵⁷

A similar position was held in the *Patrick Ouma Onyango and 12 others v Hon The Attorney General and 2 others*¹⁵⁸ as well as in *Jesse Kamau and 25 others v Attorney General*¹⁵⁹ where the Court appreciated that 'it is only the people who have the power to enact a new constitution'.¹⁶⁰

155 Pages 679 – 680.

156 See section 1 of the Constitution. The provision in question simply read: 'Kenya is a sovereign Republic.'

157 Page 679.

158 (2010) eKLR.

159 (2010) eKLR.

160 Page 43.

CHAPTER 6

SUPREMACY OF THE CONSTITUTION

The 2010 Constitution articulates the now well-entrenched principle of the supremacy of the constitution.¹⁶¹ The principle presupposes a hierarchy of norms, which scheme reserves for the written constitution a pride of place. In this set up the constitution is the most important piece of law in the legal system and ranks over and above all other legislations, customs, conventions and principles. Thus, in case of a conflict between the constitution and any the other norm the former prevails. There are four plausible explanations for this principle: express constitutional provision; judicial precedent; Kelsenian and the social contractarian theory.

CONSTITUTIONAL BASIS FOR THE PRINCIPLE OF SUPREMACY OF THE CONSTITUTION

The principle of constitutional supremacy could be inferred from at least two legislations, the Constitution and the Judicature Act. In the former, the inference is express; in the latter, it is implied.

The Constitution

The Constitution (at article 2) stipulates the major ingredients that characterize the principle of constitutional supremacy in Kenya. The first and perhaps most cardinal attribute of the principle reckons that the Constitution ‘is the supreme law and binds all persons and all State organs at both levels of government’.¹⁶² The latter part is further buttressed in the Bill of Rights, which ‘applies to all law and binds all State organs and all persons’.¹⁶³ The second attribute affirms the centrality of the Constitution in that the authority of the State is exercised only as authorized by it.¹⁶⁴ There is, in other words, no legitimate foundation of authority other than the Constitution.

161 Article 2.

162 Article 2(1).

163 Article 20(1).

164 Article 2(2).

The third attribute excludes the Constitution from any contestation before a court of law given that its validity or legality is not subject to challenge by or before any court or other State organ. This seems to be an attempt at avoiding debacles as have happened previously when constitutional provisions have been questioned. In the *Njoya* case, for instance, Ringera J decried certain constitutional amendments and fell short of declaring them invalid. The judge's disapproval was forcefully registered, thus:

Since independence in 1963, there have been thirty-eight (38) amendments to the Constitution. The most significant ones involved a change from Dominion to Republican status, abolition of Regionalism, change from a Parliamentary to a Presidential system of executive governance, abolition of a bicameral legislature, alteration of the entrenched majorities required for constitutional amendments, abolition of security of tenure for judges and other constitutional office holders (now restored), and the making of the country into a one party state (now reversed). And in 1969 by Act No 5 Parliament consolidated all the previous amendments, introduced new ones and reproduced the constitution in a revised form. The effect of all those amendments was to substantially alter the Constitution. Some of them could not be described as anything other than an alteration of the basic structure or features of the Constitution... *...all I can say in that respect is that, fortunately or unfortunately, the changes were not challenged in the courts and so they are now part of our Constitution.*¹⁶⁵

But it was in the *Jesse Kamau* case that a formidable challenge to a constitutional provision was launched. High Court judges Nyamu, Wendo and Emukule ruled that section 66 of the former Constitution establishing Kadhis' courts was inconsistent with the secular nature of the State arguing that the impugned provision did not advance the values that characterize a secular state. The Court stated that:

As between the state and religion each had its own sphere, the power of law-making for the public good and the latter of religious teaching observance and practice. To the extent that Section 66 sought to give to religious principles and commandments the force and character of law, religion stepped out of its own sphere and encroached on that of law-making in the sense that it was made to coerce the state into

165 Emphasis added.,

enacting religious principles and commandments into law. That would indeed be constitutionally possible where not only one particular religion was the state religion but also the holy book of that religion was the supreme law.

This attempt at nullifying constitutional provisions amounts to a theoretical absurdity, which, fortunately, is now salvaged by the clause under review.

Finally, the fourth principle makes it clear that:

Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.¹⁶⁶

This is the basis upon which other norms found contrary to the supreme law may be declared invalid or unconstitutional. The power to declare laws invalid is judicial and ought to be exercised by courts of law. It is in the High Court that this power resides. The superior court has:

Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of— (i) the question whether any law inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law inconsistent with, or in contravention of, this Constitution...¹⁶⁷

The Constitution anticipates that such appeals from the High Court may be lodged with the Court of Appeal¹⁶⁸ or/and consequently the Supreme Court.¹⁶⁹

The Judicature Act

Although the 2010 Constitution introduces new sources of law such as international law,¹⁷⁰ there is still a sense to which the Judicature Act may be acceptable as containing an elaborate catalogue of the valid norms in the legal system. As shown in earlier sections of this

166 Article 2(4).

167 Article 165(3)(d).

168 Article 164(3).

169 Article 163(4).

170 See article 2(5) and 2(6).

book it offers a list of sources of law with the Constitution at its very apex. A presumption is normally made from the order of the listed norms that the Constitution is paramount. It ought to, thus, prevail in case of a contradiction between it and any other norm.

JUDICIAL PRECEDENT: *MARBURY V MADISON*

The principle of constitutional supremacy – as it is today known – traces its origins to the landmark precedent of the Supreme Court of the US, *Marbury v Madison*.¹⁷¹ In this decision, the Supreme Court found that the constitution, as a source of law, is paramount and is to triumph where an alternative or conflicting position is provided in any other law. This is because constitutions are written to limit government, a role which is best served where all other rules are subordinated by it. Supremacy, the Supreme Court ruled, is pertinent to the tradition of written constitutions – as opposed to the unwritten tradition as is the case in Britain – and it would amount to an absurdity or ‘solemn mockery’ if this hallowed status is not accorded the constitution. Failure to uphold constitutional supremacy, the Court further observed, flies in the face of the judicial oath as judges swear allegiance to the written constitution. It is therefore logical that a document of this character ought to override all other norms. CJ John Marshall ably stated the rationale for the principle:

The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgiven, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Marshall CJ proceeded:

¹⁷¹ 5 US (1 Cranch) 137 (1803).

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people to limit a power in its own nature illimitable. ... This theory is essentially attached to a written constitution, and is consequently, to be considered, by this court, as one of the fundamental principles of our society. ... It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. ... Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. ... Why does a judge swear to discharge his duties agreeably to the constitution of the United States if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime. Thus the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts as well as other department, are bound by that instrument.

This precedent almost immediately found its way and sway in the precincts of Kenya's courts on attainment of self-government and its influence remains alive. Within a decade of independence, the High Court in *Okunda v Republic*¹⁷² reached the conclusion that

172 [1970] EA, page 453.

supremacy of the constitution was a most visible characteristic of the Constitution noting that:

If a constitutional lawyer were to write about in the same strain as Dicey did about England, he would, to be accurate, have to emphasize the supremacy of the constitution rather than one organ of government. The Constitution and any Acts amending it must in the nature of things override all other laws.

The Court had in mind the following provision:

This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.¹⁷³

In *Stephen Mwai Gachiengo and Albert Muthee Kahuhia v Republic of Kenya*,¹⁷⁴ the High Court held that the Kenya Anti Corruption Authority (KACA) was unconstitutional because its founding statute did not conform to certain constitutional principles. One of the reasons for the unconstitutionality was that the impugned law¹⁷⁵ gave KACA enormous prosecutorial powers yet the Constitution reserved such mandate exclusively for the Attorney General (AG).¹⁷⁶ Similarly, in the *Kenya Bankers Association*¹⁷⁷ case, the High Court yet again declared sections of the Central Bank of Kenya (Amendment) Act, 2000,¹⁷⁸ unconstitutional for being in conflict with certain provisions of the Bill of Rights. The Act had prescribed certain penal sanctions which provisions were meant to apply retrogressively, inconsistent with section 77(4) of the repealed Constitution. In May 2010, three months prior to the enactment of the current Constitution, the High Court declared the Kadhis' Courts Act¹⁷⁹ invalid because it extended the jurisdiction of the Kadhis' Court to Nyanza, Western, Rift Valley, Central, Eastern and

173 Section 3, former Constitution.

174 Nairobi High Court Criminal Application No 302 of 2000.

175 Section 11B of the Prevention of Corruption Act, Cap 65, Laws of Kenya.

176 Section 26 of the repealed Constitution.

177 *Kenya Bankers Association v Minister for Finance and another* [2002] eKLR.

178 Act number 4 of 2001.

179 Chapter 11, Laws of Kenya.

Nairobi provinces. This, the judges argued, was in breach of section 179(4) of the Independence Constitution and section 66(4) of the repealed Constitution which limited the jurisdiction of Kadhis Courts to the Coastal strip.¹⁸⁰

KELSEN'S BASIC NORM THEORY

Hans Kelsen's contribution to the body of jurisprudence and especially legal positivism is a colossal one. He is the author of the *pure theory of law* and the *basic norm theory*. Kelsen conceives of a legal system as composing a number of norms. These legal norms exist in a hierarchy, a 'chain of creation' in which each norm extracts its validity from the other immediately above it. In this framework, 'a plurality of norms forms a unity, a system, an order, if the validity of the norms can be traced back to a single norm as the ultimate basis of validity'. All the other laws ultimately owe their validity to what is called the basic norm. This basic norm 'constitutes the unity in the plurality of all norms forming a system'.

Tracing the various norms of a legal system back to a basic norm is a matter of showing that a particular norm was created in accordance with the basic norm. For example, one may ask why a certain coercive act is a legal act and thus belongs to a certain legal system – the coercive act of incarceration, say, whereby one human being deprives another of liberty. The answer is that this act was prescribed by a certain individual norm, a judicial decision. Suppose one asks further why this individual norm is valid, indeed, why it is valid as a component of a certain legal system. The answer is that this individual norm was issued in accordance with the criminal code. And if one asks about the basis of the validity of the criminal code, one arrives at the state constitution, according to whose provisions the criminal code was enacted by the competent authorities in a constitutionally prescribed procedure.¹⁸¹

180 *Jesse Kamau and 25 others v Attorney General*, page 84. There are however, doubts regarding whether this verdict was given effect in practice. Further, this contribution has serious doubts as to the soundness of the decision of the Court.

181 Kelsen (n 84 above) 57.

It is suggested here that the eventual basic norm is the prevailing constitution or sometimes an earlier one.¹⁸² Thus, the constitution as a norm is above all the others – and it is through it that the other sources of law acquire validity. The constitution as the yardstick for credibility is therefore supreme, and other laws ought to conform to it if they are to apply.

SOCIAL CONTRACT THEORY

Another relevant philosophy in jurisprudence and constitutional law that explains the supremacy of the constitution is the social contract theory. Under this cluster fall ideas of John Locke,¹⁸³ Thom Hobbes,¹⁸⁴ Jean-Jacques Rousseau,¹⁸⁵ Thom Paine¹⁸⁶ amongst others. There are traces of this philosophy in Thomas Jefferson's Declaration of Independence. In the *Leviathan*, Hobbes argues that the modern system of government owes its existence to the excesses of an initial primitive society operating without any form of common administration. In the absence of coercive governance structures men conducted business under the dictates of their unlimited natural instincts and did not have to conform to any organized system of rules imposed by, say, government.

If any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their end (which is principally their own conservation, and sometimes their delectation only) endeavour to destroy or subdue one another. And from hence it comes to pass that where an invader hath no more to fear than another man's single power, if one plant, sow, build, or possess a convenient seat,

182 It is however, trite that the constitution is not always the ultimate. Kelsen reckoned that:

If one goes on to ask about the basis of the validity of the constitution, on which rest all statutes and the legal acts stemming from those statutes, one may come across an earlier constitution, and finally the first constitution, historically speaking, established by a single usurper or a council, however assembled. What is to be valid as norm is whatever the framers of the first constitution have expressed as their will – this is the basic presupposition of all cognition of the legal system resting on this constitution.

183 See, for instance, J Locke *Second treatise on civil government* (1690).

184 See, T Hobbes *The leviathan* (1651).

185 See, J Rousseau *The social contract or principles of political right* (1762).

186 See, T Paine *The common sense* (1776).

others may probably be expected to come prepared with forces united to dispossess and deprive him, not only of the fruit of his labour, but also of his life or liberty. And the invader again is in the like danger of another.¹⁸⁷

Society in this state of nature was in ‘a condition of war of every one against every one’, because every one would be governed by his or her own reason.¹⁸⁸ Might was right in other words. Hobbes’ description of the situation in the state of nature remains apt:

To this war of every man against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice. Force and fraud are in war the two cardinal virtues. Justice and injustice are none of the faculties neither of the body nor mind.¹⁸⁹

Such a society is inimical to private ownership of property or even the entire concept of rights. It was this sad state of affairs that necessitated the civil society under organized and coercive government. In the civil society, all individuals surrender their natural rights to violence to a form of government in exchange for mutual security and fundamental rights. Government thus becomes a necessary compromise and the constitution arguably the agreement or contract that gives rise to it. The constitution, being the significant social contract, therefore, must occupy an important place in the legal set-up.

187 Leviathan, Of the natural condition of mankind as concerning their felicity and misery, Chapter XIII..

188 Leviathan, Of the first and second laws, and of contracts, Chapter XIV.

189 Hobbes (n 184 above).

CHAPTER 7

THE RULE OF LAW

Intellectual ownership of the ‘concept of the rule of law’ would be difficult to claim. This is because the:

Rule of law in some form may be traced back to Aristotle and has been championed by Roman jurists; medieval natural law thinkers; Enlightenment philosophers such as Hobbes, Locke, Rousseau, Montesquieu and the American founders; German philosophers Kant, Hegel and the nineteenth century advocates of the *rechtsstaat*; and in this century such ideologically diverse figures as Hayek, Rawls, Scalia, Jiang Zemin and Lee Kuan Yew.¹⁹⁰

THE DICEYAN CONCEPTION

The concept of the rule of law, in its Westminster and most reputed formulation, is, however, often attributed to AV Dicey.¹⁹¹ Dicey spared constructive intellectual moments to study the English Constitution and noticed that it had the ‘rule of law’ as a central feature.¹⁹² The rule of law, he argued, was one expression with at least three though kindred conceptions. In the first place, the concept entails that no man can be lawfully made to suffer in body or in goods except for a distinct breach of law *established in the ordinary legal manner before the ordinary courts of the land*. In this sense, he argued that the rule of law is contrasted with every system of government based on the exercise by persons in authority of *wide*, arbitrary, or discretionary powers of constraint.¹⁹³ This postulation was not entirely an innovation. The Magna Carta had recognized much earlier that:¹⁹⁴

190 R Peerenboom ‘Human rights and rule of law: What’s the relationship?’ (2005) *Spring Georgetown Journal of International Law* 810.

191 See ECS Wade & AW Bradley *Constitutional law* (1970) 63, where it is stated: ‘Of all writers on the constitution since Blackstone the most influential has been the late A.V. Dicey...’

192 Generally, AV Dicey *Introduction to the study of the law of the constitution* (1885).

193 Dicey (n 192 above).

194 ‘Magna Carta’ ch 39 in H Marsh *British documents of liberty* (1971) 44 – 47.

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

In the second sense, the concept entails not only that no man is above the law, but also that every man, whatever be his/her rank or condition, is subject to the *ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals*. Dicey underscored the need for judicial processes being effected in ordinary tribunals hence elevating the role of the judicial branch of state. Again, this idea was not novel. Locke already held that ‘no man in the civil society can be exempted from the laws of it.’¹⁹⁵

The Diceyan term ‘rule of law’ has a third conception. That:¹⁹⁶

The constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.

Dicey praised the rule of law, exemplified by the English Constitution, as a sound concept and ordained it the distinguishing character of English constitutionalism. Of this characteristic, he boasted:¹⁹⁷

Foreign observers of English manners, such for example as Voltaire, De Lolme, de Tocqueville, or Gneist, have been far more struck than have Englishmen themselves with the fact that England is a country governed, as is scarcely any other part of Europe, under the rule of law...

CRITICISMS OF THE DICEYAN CONCEPTION

It is noteworthy that Dicey concentrated on the situation and circumstances prevailing in the UK at the time of his writing. For

¹⁹⁵ J Locke *Of civil government* (1948) (1689) 57.

¹⁹⁶ Dicey (n 192 above) 196.

¹⁹⁷ Dicey (n 192 above) 184.

instance, the unique history of running government on the wheels of a largely unwritten constitution could have driven the UK to a constitutional scheme whereby ordinary courts, rather than the constitution, are the heart of the rule of law.¹⁹⁸ Thus,

Dicey's focus on the ordinary courts of the land as the bedrock of the rule of law could not realistically apply, for instance, to the developing countries of Africa. In such countries, the courts are out of reach of most of the people, especially for reasons of poverty and ignorance.¹⁹⁹

It is, probably, for the reason of this distinctive cradle that it has not been easy to decipher the exact meaning of the rule of law as expounded by Dicey; neither has his idea been unanimously accepted. The Diceyan conception of the rule of law has, consequently, been a subject of much academic criticism. According to Gutto,²⁰⁰ some of the shortcomings of the Diceyan conception include the following: The conception favours judicial legislation which makes the law less, and not more, certain; the conception failed to take into account social differentiation and legally sanctioned inequalities that existed both in substantive and procedural law between men and women; and the model has a narrow conception of state power with the judicial branch of the government being the passive branch in the sense that its operation depended primarily on mobilization of the law by private citizens which mobilization remains largely dependent on their power to hire legal services, and partly on the executive branch of the government – especially the overt and covert police and other security agencies.

Appadorai²⁰¹ opines that on all hands,²⁰² Dicey's analysis is defective; in particular, he argues, it tended to unduly exaggerate 'the merits of the rule of law' whereas it is now seen that the rule of law as it prevails in Britain is subject to one limitation. The limitation is; with the extension of governmental activities into new fields such

198 Ojwang (n 47 above) 9.

199 As above.

200 BOS Gutto 'The rule of law, democracy and human rights: Whither Africa?' (1996) Volume 3 number 1 *East African Journal of Peace and Human Rights* 130.

201 See generally A Appadorai *The substance of politics* (1968).

202 Appadorai makes reference to the writings of Wade ECS, in his introduction to Dicey, *Introduction to the study of the Law of the Constitution* (9th edition) p cxx; WI Jennings *The Law of the Constitution* ch ii, and WA Robson *Justice and Administrative Law*.

as education, public health, town planning, the protection of the unemployed *et cetera*, it has become common to entrust to executive authorities judicial duties which, if the rule of law prevailed without exception, would have been entrusted to the ordinary courts.²⁰³

Kapur categorically states that ‘the “rule of law” as enunciated by Dicey is now subject to serious limitations.’ He cites the great increase in the activities of the State during the past sixty years or so as having limited the ‘rule of law’ far more seriously. When Dicey, in 1885, wrote the first edition of his *Law of the constitution*, the primary functions of the state were the preservation of law and order, defence and foreign relations. Today, the functions of the State are more positive and they regulate the national life in multifarious ways. Discretionary authority is thus in every detail inevitable. Emphasis has, however, been placed upon the distinction between discretionary power and arbitrary power, that is, power exercised by an agent responsible to none and subject to no control.²⁰⁴

Writing earlier in 1933, Jennings had stated that the exposition given by Dicey of the concept creates a false impression.²⁰⁵ Commenting decades later, de Smith described the concept as ‘one of open texture’ which ‘lends itself to an extremely wide range of interpretations.’²⁰⁶ He did not, nonetheless, fail to attempt an interpretation of the concept. Writes de Smith:²⁰⁷

One can at least say that the concept is usually intended to imply (i) that the powers exercised by politicians and officials must have a legitimate foundation; they must be based on authority conferred by law; and (ii) that the law should conform to certain minimum standards of justice, both substantive and procedural.

The rule of law, therefore, precludes arbitrary action on the part of those who run and control government.²⁰⁸ The foregoing leads us

203 The administrative quasi judicial organs do not always observe the essentials of judicial procedure such as publicity, oral hearing, the taking of evidence, known and impartial judges, and reasoned judgment hence there is a possibility of arbitrariness with the consequent danger to the liberty of the individual.

204 AC Kapur *Principles of political science* (1996) 632.

205 WI Jennings *The law and the constitution* (1933) 44.

206 S de Smith *Constitution and administrative law* (1977) 40.

207 As above.

208 GW Kanyaihamba *Constitutional and political history of Uganda: From 1894 to the present* (2002) 301.

to conclude that at the core of the respect for the rule of law are, first, clear and certain rules (the normative framework), the effective institutional framework to enforce the law, and, the absence of arbitrariness.

Perhaps because of the above misinterpretations, the International Commission of Jurists (ICJ) convened a number of conferences for purposes of agreeing upon an adaptation of Dicey's exposition of the rule of law that could be made universal. The most notable result of these conferences was the Declaration of Delhi of 1959.²⁰⁹ This Declaration conceptualized the rule of law to entail:

- (a) The right to representative and responsive government – that is the right to be governed by a representative body answerable to the people;
- (b) The provision of a remedy for every citizen wronged by government;
- (c) Certain minimum standards or principles for the law – those contained in the UDHR 1948 and the European Convention on Human Rights 1953 – including freedom of religion, freedom of assembly and association, the absence of retroactive penal laws;
- (d) The right to a fair trial, which involves; Certainty of criminal law; the presumption of innocence; reasonable rules relating to arrest, accusation and detention pending trial; the right to legal advice; public trial; the right to appeal; the absence of cruel and unusual punishment; and
- (e) The independence of the judiciary including proper grounds and procedure for the removal of judges.

THE RULE OF LAW AND THE 2010 CONSTITUTION

If it is agreed that an accurate meaning of the rule of law has been supplied, then, it is not difficult to identify its traces in the 2010 Constitution of Kenya. To begin with, the enactment of a written constitution is, in itself, evidence of the rule of law. True, the object of any sound constitution 'is definitely to establish the rule of law.'²¹⁰ It has been argued that the law regulates political action

209 It resulted from a congress organized by the ICJ in New Delhi and attended by jurists from over 50 countries.

210 Jennings (n 205 above) 41.

far more closely where there is a written constitution prescribing more fundamental functions of government than where there is a supreme legislature as in the UK.²¹¹ Unlike the UK, Kenya boasts of a written constitution. A remarkable feature of this Constitution is that it declares itself sovereign over and above other laws, actions, authorities, precedents, customs or conventions. Its place in the social and political dispensation is clear:²¹²

- (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
- (2) No person may claim or exercise State authority except as authorized under this Constitution.
- (3)
- (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

Thus, each 'action of a public authority can be tested by the Constitution, or by the laws made in accordance with the Constitution, to determine whether it was legal or illegal.'²¹³ Kenya has therefore, like the rest of democracies in Africa,²¹⁴ anchored all her programmes, actions and policy directions on the rule of law, the pivot point of which is the Constitution. Looked at from Jennings' point of view, this development of enacting a supreme written constitution could be interpreted as a fundamental proof of the resolve to uphold the rule of law.

In all critical regards, the framework erected in the new constitutional order is an attempt at representative and responsive

211 Jennings (n 205 above) 51.

212 Article 2.

213 N 211 above.

214 The 1996 Constitution of the Republic of South Africa equally provides: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled' (section 2). A similar stipulation exists in the Constitution of the Republic of Ghana (article 1(2)). The Constitution of the Arab Republic of Egypt is, perhaps, a notable departure from the monologue of supreme constitutions. It recognizes the pillars of Islam law as the principle source of legislation (article 2). Nonetheless, it reckons the uncontested supremacy of the law (article 65).

government. For instance, parts of the national values are principles of good governance, integrity, transparency and accountability.²¹⁵ Similarly, the electoral system is envisioned to be representative of both (all) genders, persons with disabilities²¹⁶ as well as adhere to universal suffrage based on the aspiration for fair representation, equality of the vote²¹⁷ and free and fair elections.²¹⁸

Although Dicey understood the mandate of stipulating rights to be the province of judicial tribunals in the UK, in Kenya, that end is served by the Constitution itself which at Chapter 4 guarantees a number of entitlements. These include the rights to – life; equality and freedom from discrimination; human dignity; freedom of conscience, religion, belief and opinion; freedom of expression; political rights; access to justice; and humane treatment and fair hearing of suspected, arrested or detained persons.²¹⁹ Equality of every person before the law and the right to equal protection and benefit of the law is also guaranteed.²²⁰

An accused person is afforded a public trial before a court of law.²²¹ In the same vein, no one is to be convicted for an act or omission which at the time it was committed or omitted was not an offence in Kenya or a crime under international law, a position that is certainly in honour of Dicey's theory.²²² The Constitution further sanctifies the right to ownership and enjoyment of private property.²²³ In addition, Parliament is constrained from enacting laws that take away private property or its enjoyment except in the limited circumstances provided by the supreme law. The material sections read:²²⁴

215 Article 10(2)(c).

216 Article 81(c).

217 Article 81(d).

218 Article 81(e).

219 Part 2, Bill of Rights (Chapter 4).

220 Article 27(1).

221 Article 50(d). Many modern constitutions stipulate that no person may be punished or made to suffer except through a legal sentence entered by a competent and ordinary tribunal after a due process of law. The constitutions of Ghana, South Africa, Uganda and many others have adopted this approach, in honour of Dicey's theory.

222 Article 50(n).

223 Article 40(2).

224 Article 40(2).

- (2) Parliament shall not enact a law that permits the State or any person:
- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

The cross-referenced article 27(4) prohibits direct or indirect discrimination on the grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. The two articles read together imply that discrimination in the ownership and enjoyment of property is proscribed, a major improvement on Dicey's original philosophy. The provisions are certain to benefit especially the female gender, which as Gutto observes above, has in the past suffered distinctions of profound proportions, more so in the ownership or enjoyment of property. It is why one of the key principles of the land policy is the 'elimination of gender discrimination in law, customs and practices related to land and property in land',²²⁵ There are however two major instances when the right to enjoy or own property may be conceded. The first scenario is where the deprivation in question results from an acquisition of land or an interest in land, in accordance with the chapter on land and environment.²²⁶ Under this framework, for instance,

The State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning.²²⁷

The second limitation operates where the entitlement is constrained for a public purpose.²²⁸ In this case, prompt payment in full, of just compensation is required.²²⁹ Further, the person whose property rights are restricted is entitled to the right of access to a court of

225 Article 60(f).

226 Chapter Five.

227 Article 66(1).

228 Article 40(3)(b).

229 Article 40(3)(b)(i).

law.²³⁰ Further still, provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) of the article even though they may not hold title to land.²³¹

Courts of law are envisioned to play a critical role in the protection of human rights; and it is especially the High Court, which is entrusted with the power ‘to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom’.²³² It is left to Parliament to enact legislation to give jurisdiction ‘to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights’.²³³ In the course of enforcement or interpretation of rights, courts should ideally breathe more life into constitutional provisions. They ought to expand rather than restrict the scope of the rights as well as innovatively apply the remedies provided. One may add that the doctrine of judicial precedent could play a critical in the new constitutional order. As discussed elsewhere in this publication, now more than ever before, the doctrine of judicial independence has been given literal constitutional meaning, bringing to passage Dicey’s ‘triple limbed’ theory.

SIGNIFICANCE OF THE RULE OF LAW

In conclusion, it is important to observe that the Diceyan doctrine is not ‘good for nothing’. It serves numerous ends. It has been advanced that the observance of the rule of law is critical to progress in both the under-developed and developed worlds.²³⁴ In this regard, the rule of law is said to be the key that can unlock greater economic and ethical wealth.²³⁵ A former President of the World Bank has even advised that for Africa to develop, ‘it needs strong, well established rule of law regimes to enable it to trade itself into prosperity and out

230 Article 40(3)(b)(ii).

231 Article 40(5).

232 Article 22 & 23.

233 Article 23(2).

234 Rt. Hon. Lord Woolf of Barnes ‘The Judiciary of England and Wales and the rule of law’ (2006) *Indiana Law Review* 616.

235 As above

of poverty.’²³⁶ This counsel should be applicable to Kenya. Preambular paragraph 3 of the UDHR,²³⁷ reckons that it is essential that ‘human rights should be protected by the rule of law.’ In this way the rule of law has come to be identified with the concept of the rights of man.²³⁸ During a forum organized by the International Commission of Jurists in Delhi in 1959, alluded to above, representatives of no fewer than fifty three countries affirmed their recognition that the rule of law is a dynamic concept which should be employed to safeguard and advance the political and civil rights of the individual in a free society.

236 JD Wolfensohn, President, World Bank Group, Empowerment, Security and Opportunity through Law and Justice, Address in St. Petersburg, Russia (9 July 2001).

237 Adopted and proclaimed by the United Nations (UN) General Assembly in resolution 217A (III) of 10 December 1948.

238 Bradley & Ewing (n 1 above) 63.

CHAPTER 8

SEPARATION OF POWERS

De Smith recounted the history and epochs of the doctrine of separation of powers in the most dramatic format. The doctrine, he records,²³⁹

...is traceable back to Aristotle; it was developed by Locke; its best known formulation, by the French political philosopher Montesquieu, was based on an analysis of the English Constitution of the early eighteenth century, but an idealized rather than a real English Constitution; the disciples of Montesquieu, particularly numerous in the North American colonies, added their own refinements and today the doctrine survives in a number of curious manifestations.

Lord Atkins alluded to, perhaps, one of the earliest and most influential statements in political and legal thought. He conceived that ‘power tends to corrupt’ and that ‘absolute power tends to corrupt absolutely.’

In 1690, Locke²⁴⁰ warned against the concentration of state powers in a few hands. He pointed out that where state power is entrusted with a few persons, the liberty and security of citizens often rests in imminent danger. The panacea he supplied to this vexing state of affairs is the distribution of power to different individuals and institutions. Locke posited three powers, a legislative, an executive and a federative.²⁴¹ By ‘federative’, he meant the power to conduct foreign affairs.²⁴² The philosopher did not envisage an independent judiciary and neither did he believe in ‘independence and equality’ as fundamental attributes of separation of powers; for he is on record as having held: ‘There can be but one supreme power, which is the legislative, to which all the rest are and must be

239 De Smith (n 206 above) 40, 41.

240 Locke (n 183 above) ch xii, 143.

241 RC Sarvis ‘Legislative delegation and two conceptions of the legislative power’ (2006) *Pierce Law Review* 319.

242 As above.

subordinate.’²⁴³ Locke’s following sacred pronouncements are often recited in the context of separation of powers:

It may be too great a temptation to humane frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their private advantage.²⁴⁴

MONTESQUIEU AND SEPARATION OF POWERS

The doctrine of separation of powers²⁴⁵ is, however, often ascribed to the French jurist, Montesquieu.²⁴⁶ Montesquieu, in *L’Esprit des Lois*,²⁴⁷ 1748, assessed the Constitution of the UK and deduced that it had a discernible Executive, a Legislature, and a Judiciary. This tripartite division of functions, he argued, was a common feature of governments. His sentiments in this regard have attained sanctity:

In every government there are three sorts of power: the legislative; the executive in respect of things dependent on the law of nations; and the executive in regard to matters that depend on civil law. By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have already been enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.²⁴⁸

The Montesquieu idea of dispersing state power is not arbitrary. It has got ends. One cardinal end is the protection of fundamental

243 Locke (n 183 above) 149.

244 Locke (n 183 above) ch xii, 143.

245 There are still many contemporary writings on the doctrine of separation of powers. See, R C Sarvis ‘Legislative delegation and two conceptions of the legislative power’ (2006) *Pierce Law Review* 317; Also KE Whittington ‘Madison has left the building’ (2005) *Summer University of Chicago Law Review*.

246 Editorial to Montesquieu’s translated treatise states: ‘It is he (Montesquieu), and not Locke, who must be called the father of the doctrine.’ B de Montesquieu *The spirit of laws* trans T Nugent (1949). lvii.

247 For an English version, see B de Montesquieu *The spirit of laws* trans T Nugent (1949).

248 Montesquieu (n 246 above) xi, 6.

human rights and liberties.²⁴⁹ The French philosopher himself prescribed that:

Political liberty is to be found ... only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go ... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another ... When the legislative and executive powers are united in the same person or body ... there can be no liberty ... Again, there is no liberty if the judicial power is not separated from the legislative and the executive ... There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all the three powers.²⁵⁰

In its pure form, Montesquieu's concept 'of separation of powers' may mean at least three different things:²⁵¹

- (a) That the same persons should not form part of more than one of the three organs of government, for example, that ministers should not sit in parliament;
- (b) That one organ of government should not control or interfere with the work of another, for example, that the judiciary should be independent of the executive; and
- (c) That one organ of government should not exercise the functions of another, for example, that ministers should not have legislative powers.

SEPARATION OF POWERS IN KENYA'S 2010 CONSTITUTION

Informed by the philosophy of separation of powers, most democratic constitutions have weaved state power in almost similar terms. The 1787 Constitution of the USA has been ranked as one with the clearest distinction of state functions.²⁵² This Constitution provides that 'all legislative powers ... shall be vested in a Congress

249 In L Fisher *American constitutional law* (1990) 217, it is noted: 'It is often said that powers are separated to preserve liberties.' See also Mr. Justice Frankfurter *Youngstown Sheet & Tube v Sawyer* 343 US 579 (1952).

250 Montesquieu (n 246 above) xi, 4.

251 See Bradley & Ewing (n 1 above) 58.

252 See, Bradley & Ewing (n 1 above) 155., where the Constitution of the USA is hailed as having observed a strict adherence to the doctrine of separation of powers.

of the USA.²⁵³ It also stipulates: ‘the executive power shall be vested in a President of the USA,’²⁵⁴ and further that ‘the judicial power of the USA shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish’.²⁵⁵

This record is now closely contested by Kenya’s autochthonous 2010 Constitution which, perhaps, because of an experience prone to abuses and usurpations – similar to that narrated by Montesquieu’s excerpt above – resolved to as much as possible separate the persons, functions and institutions of State. The 2010 Constitution provides: ‘The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.’²⁵⁶ The Constitution further provides that: ‘No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation’.²⁵⁷ On the other hand, executive authority of the State is vested in the President, the Deputy President and the Cabinet.²⁵⁸ There is an additional constitutional safeguard that the President holds no other State or public office.²⁵⁹ Similarly, a cabinet secretary is not required to be a Member of Parliament (MP).²⁶⁰ The new ‘grund-norm’ vests judicial authority in the courts and tribunals established by or under it.²⁶¹ Further, caution is taken to ensure that exercise of judicial authority is conducted only in accordance to the Constitution and is not subjected to the control or direction of any person or authority.²⁶²

The entire scheme of separating powers is also replicated at the devolved government level. County governments are for example

253 Article I, US Constitution.

254 Article II, US Constitution.

255 Article III, US Constitution.

256 Article 94(1). Parliament of Kenya, consist of the National Assembly and the Senate – article 93(1).

257 Article 94(5).

258 Article 130(1).

259 Article 130(3).

260 Article 152(3).

261 Article 159(1).

262 Article 160(1).

envisioned to be ‘based on democratic principles and the separation of powers’.²⁶³ The very definition of county government visualizes two organs; ‘a county assembly and a county executive’.²⁶⁴ The county executive is mandated to implement both county legislations and national laws (to the extent that this is appropriate) as well as manage, coordinate and administer the functions of the county government.²⁶⁵ The legislative authority of a county is vested in, and exercised by, its county assembly.²⁶⁶ It is posited here that the national Judiciary would suffice as an arbiter of legal disputes arising out of county governments.

By almost completely separating persons, functions and institutions exercising State power in line with Montesquieu’s theory, Kenya has attained a feat hardly achieved by many jurisdictions. This is not to say, however, that other jurisdictions on the continent have not taken cue. To the contrary, efforts have been made to secure this doctrine in most Constitutions in Africa. According to Udombana:

Postcolonial African States have strived to fashion themselves in the image of Western liberalism ... The term “Modern State” is usually used to illustrate Western political philosophy that conceives government as comprised of three independent organs – the legislature, the executive, and the judiciary – functioning within a territory that is unambiguously defined.²⁶⁷

Even as the new Constitution should be celebrated for separating powers, it needs to be remembered that complete separation is possible neither in theory nor in practice.²⁶⁸ In fact, there has been sensational debate regarding whether the Westminster constitutional model, the very subject of study by Montesquieu, thrives on the doctrine of separation of powers in its entirety. According to Wade and Bradley, though the doctrine was based on a study of the Constitution of the UK, it is in the Constitution of the USA that

263 Article 175(a).

264 Article 176(1).

265 Article 183(1).

266 Article 185(1).

267 See NJ Udombana ‘Articulating the right to democratic governance in Africa’ (2003) Summer *Michigan Journal of International Law* 1213.

268 Bradley & Ewing (n 1 above) 58.

its influence can best be seen.²⁶⁹ De Smith asserted that ‘no writer of repute would claim that it [separation of powers] is a central feature of the modern British constitution’²⁷⁰ while Marshall observed that ‘Montesquieu’s assertions ... were inappropriate even when he made them’.²⁷¹

It is argued here that this doctrine, even though preferred by Kenyan’s new Constitution, remains evasive. Marshall has described it as ‘one of the most confusing in the vocabulary of political and constitutional thought.’²⁷² It has also been argued that ‘in both theory and practice, it teems with subtleties, ironies and apparent contradictions.’²⁷³ In essence, the French philosopher suggested what in practice would entail a watertight delineation of state functions. Some writers allege that this would be a misnomer in its ultimate.²⁷⁴ It would denote, for instance, that members of the executive branch of government do not sit at all in the legislative organ or in the judiciary; it would mean that no organ of state performs the functions of another; and it would imply that no organ of state is allowed to interfere with the operations of another.²⁷⁵ Applied in this pure state, government would come to naught.²⁷⁶ The tripartite system would fail to function. True, rigid adherence to separated powers ‘in all cases would be subversive of the efficiency of the government, and result in the destruction of the public liberties.’ Justice Jackson of the USA thus wrote of a Constitution that compares favorably with Kenya’s:²⁷⁷

While the Constitution diffuses power the better to secure liberty, it also contemplates that the practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but independence, autonomy but reciprocity.

269 Wade & Bradley (n 191 above) 25.

270 S de Smith (n 206 above) 41.

271 G Marshall *Constitutional theory* (1971) 97.

272 As above.

273 L Fisher *American constitutional law* (1990) 217.

274 OH Phillips & Jackson *Constitutional and administrative law* (2001) 12.

275 Wade & Bradley (n 191 above) 24.

276 Fisher (n 273 above).

277 Mr. Justice Frankfurter *Youngstown Sheet & Tube v Sawyer* 343 US 579 (1952).

2010 CONSTITUTION AND THE IDEA OF CHECKS AND BALANCES

These observations may be true of Kenya's 2010 Constitution especially when the idea of checks and balances is had in contemplation. For example, although it is within the natural mandate of the Judiciary to adjudicate over disputes, including criminal conflicts, and make determination on the same, the President may exercise the power of mercy and could grant a free or conditional pardon to persons convicted of an offence;²⁷⁸ postpone the carrying out of a punishment definitely or indefinitely;²⁷⁹ substitute a less severe form of punishment or remit all or part of a punishment.²⁸⁰ Another example of a check relates to the liability of the President to be removed by the Senate.²⁸¹ Similarly, once Parliament has passed Bills, they require the assent of the President to acquire the force of law.²⁸² There is however room for the President to refer such Bills back to Parliament.²⁸³

In like manner, it is also contemplated that one organ may exercise the functions of another. In this respect, executive or administration functions are anticipated within the Judiciary. It is arguable that the CJ in the capacity as 'Head of the Judiciary'²⁸⁴ and President of the Supreme Court²⁸⁵ may be expected to carry out some administrative functions. The same could be said of the Chief Registrar who is the chief administrator and accounting officer of the Judiciary'.²⁸⁶ There is equally provision for the judicial organ to engage in law making. In addition to development of the law through judicial precedent,²⁸⁷ the Supreme Court has the power to

278 Article 133(1)(a).

279 Article 133(1)(b).

280 Article 133(1)(c).

281 Article 96(4).

282 Article 115(1)(a).

283 Article 115(1)(a).

284 Article 161(1).

285 Article 163(1)(a).

286 Article 161(2)(c).

287 It is possible to infer the concept of *stare decisis* from article 163(7) of the Constitution which provides: 'All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court'.

make rules regulating its operations.²⁸⁸ Contemporary experience seems to be in agreement that this is the proper application to be given to Montesquieu's idea. What the doctrine must be taken to advocate is the prevention of the tyranny by the conferment of too much power on any person or body, and the check of one power by another.²⁸⁹

CONSTITUTIONAL PROTECTION OF SOCIO ECONOMIC RIGHTS AND SEPARATION OF POWERS

Another development with potential implications on the practice of the doctrine of separation of powers is the constitutional articulation of judicially enforceable social and economic rights. The main difference between the implementation of civil and political rights and socio-economic rights is that whereas the former require the heavy arm of the government to refrain from engaging in certain activities, the latter entitlements impose an obligation on the government to take part in ensuring access to certain conditions, and this entails state's direct or active participation. Socio-economic rights, in this light, are therefore 'positive' rights. By their very nature, they have budgetary implications. It is, indeed, costly to set up hospitals, to supply clean water, to ensure access to housing or even to guarantee food for all.²⁹⁰ For these reasons there has been a lot of debate regarding whether the socio economic bit of the International Bill of Rights is justiciable or whether it is a collection of pious wishes. De Waal, Currie and Erasmus have accurately summarized some of the doubts entertained by those against judicial involvement in enforcing socio-economic rights:

Attempts to make social, economic and cultural rights part of a constitution are usually met by the argument that these rights are inherently non-justiciable, in other words that they are ill-suited to enforcement by the judiciary. Because they are positive rights claims

288 Article 163(8).

289 Phillips & Jackson (n 274 above) 12.

290 That is not to say, on the other hand, that civil and political rights come without any cost. To be able to guarantee, say, the right to a fair trial, a state must ensure at least a two-tier court system and that means appointing and maintaining judges and other judicial officers. This, too, has budgetary implications. It is, however, crucial to note that even though civil and political rights could evince some budgetary connotations, they are not as costly as social and economic rights.

by individuals and groups to the delivery of goods by government – it has been argued that their application requires that courts do direct the way in which the government distributes the state's resources and is thus beyond the scope of the judicial function. This is because the judiciary is usually an elite and undemocratically appointed branch of the state. Therefore, so the argument goes, it lacks the democratic legitimacy necessary to decide on the division of social resources between factions, groups and communities in society.²⁹¹

This question has arisen in the South African Constitutional Court and it is highly probable that judicial officers adjudicating disputes under the Bill of Rights of the 2010 Constitution may be confronted with the same challenges. In case of this eventuality, the judiciary might find solace in the following words of South Africa's Constitutional Court:

It is time that the mechanism of socio economic rights may result in courts making orders, which have direct implications for budgetary matters. However, when a court enforces civil and political rights such as equality, freedom of speech and right to a fair trial, the order it makes will often have implications. A court may require the provision of legal aid or the extension of state benefits' to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of separation of powers. Nevertheless we are of the view that these rights are, at least to some extent, justiciable ... At the very minimum, socio-economic rights can be negatively protected from improper invasion.²⁹²

NATIONAL HUMAN RIGHTS INSTITUTIONS AND SEPARATION OF POWERS

Recent developments appear to indicate that the conventional three organs studied by Montesquieu are no longer adequate. The practice is in favour of complementing the traditional state organs, a sign, perhaps, that the three organs of state *per se* have increasingly proved inadequate; at least in the sphere of human rights protection.²⁹³ There

291 De Waal, Currie & Erasmus (n 36 above).

292 As above.

293 It is instructive that institutions autonomous from the main organs of the state have

is a move, or rather, wave towards the establishment of independent national human rights institutions (NHRIs) to reinforce the bulwark of human rights protection mechanisms at state level, and the wave, arguably, is most pronounced in Africa.²⁹⁴ A writer has, thus, documented this development:

During the 1990s there was an exponential increase in the establishment of national human rights institutions in Africa. As recently as 1989, only one African country had established some form of human rights monitoring body. By the beginning of 2000, twenty-four African countries had provisions in their laws for national human rights bodies.²⁹⁵

The United Nations High Commission for Human Rights (UNHCHR) must have been alive to this reality when it reckoned:

It has therefore become increasingly apparent that the effective enjoyment of human rights calls for the establishment of national infrastructures for their protection and promotion. Official human rights institutions have been set up by many countries in recent years.²⁹⁶

This development is best seen in the Constitution of South Africa which recognizes that State power could be shared between the Executive, Legislative, Judiciary and other institutions supporting constitutional democracy or 'chapter 9 institutions'.²⁹⁷ These 'chapter 9' institutions include: the Public Protector;²⁹⁸ the South African Human Rights Commission (SAHRC);²⁹⁹ the Commission for the Promotion and Protection of the Rights of Cultural, Religious and

also been found necessary in such areas as election management, anti corruption campaign and central banking.

294 See, ME Tsekos 'Human rights institutions in Africa' (2002) 21 *Human Rights Brief* 21. But the development is not unique to Africa. See, C Evans 'Human rights commissions and religious conflict in the Asia-Pacific region' (2004) *International & Comparative Law Quarterly* 713.

295 Tsekos (n 294 above) 21.

296 National Institutions for the Promotion and Protection of Human Rights, Fact Sheet number 19, para 7.

297 The institutions supporting constitutional democracy are established under chapter 9 of the Constitution.

298 Article 181(1) (a).

299 Article 181(1) (b).

Linguistic Communities;³⁰⁰ the Commission for Gender Equality;³⁰¹ the Auditor-General,³⁰² and the Electoral Commission.³⁰³ These institutions are independent, and subject only to the Constitution and the law. The law implies that no person or organ of state may interfere with their functioning.³⁰⁴

The 2010 Constitution suggests certain independent constitutional commissions, which may well amount to additional full-blown organs of state, but, unlike the South African counterpart, it is shy to refer to them as organs of state. This is notwithstanding the fact that institutions like those foreseen by article 59 of the 2010 Constitution³⁰⁵ have sufficient powers, autonomy and independence enough to challenge mainstream and traditional organs of state.

PRIOR TO THE 2010 CONSTITUTION

Prior to the 2010 Constitution, Kenya's constitutional dispensation provided for these three conventional organs. However, the tripartite was unequal. For example, the independence of the Judiciary remained elusive both in law and practice. One of the main shortcomings of this Constitution was its failure to expressly assert the independence of the judicial organ of state in the same way it provided for the other two arms. Section 23(1) vested executive authority of the State in the President. Similarly, section 30 of the Constitution provided that the legislative power belonged to Parliament. The absence of a corresponding provision for the Judiciary inevitably meant that constitutional provisions had not properly addressed the institutional independence of the Judiciary.³⁰⁶

The Constitution also prescribed certain measures aimed at achieving checks and balances. In practice, however, the repealed Constitution continued to fall far below this threshold. The

300 Article 181(1) (c).

301 Article 181(1) (d).

302 Article 181(1) (e).

303 Article 181(1) (f).

304 Article 181(4).

305 Article 59.

306 See W Mitullah, M Odhiambo & O Ambani *Kenya's democratisation: Gains or loses* (2005) 37.

Legislature, for instance, lacked the requisite independence and power to successfully check the Executive. The power to commence the sessions of Parliament lay with the President and not the Speaker or Members of Parliament.³⁰⁷ In addition, the power to prorogue³⁰⁸ as well as dissolve³⁰⁹ the August House effectively resided in the office of the President, a very disempowering scenario for Parliament. While Parliament could actually pass a vote of no confidence in the President, such a verdict, if entered, also stood to terminate the life of Parliament itself.³¹⁰ 'Vote of no confidence' was thus a power that took away as much as it gave. The net result was that the Executive was able to violate even fundamental rights and liberties, in the full view of a disempowered Legislature.

The Judiciary was not spared the 'constitutional onslaught' described above. Its credibility was further weakened by the fact that constitutional convention had it that the President would appoint judges without even consulting the Judicial Service Commission (JSC) as provided by the Constitution. It was during President Mwai Kibaki's tenure that this mandate was exercised to its fullest. By December 2004, President Kibaki had appointed up to 29 new judges within a span of just two years of his reign in a Judiciary that hardly had a maximum capacity of 60 judges.³¹¹ In 2007 alone, about 10 new judges were appointed. In the end President Kibaki effectively appointed 40 judges in just five years, a very disturbing situation. Another worrying scenario is that the fairly ancient Commissioner of Assize Act³¹² may still have the force of law even in the new dispensation. This legislation provides for a scheme where the President could appoint temporary judges. Such judicial officers enjoy no security of tenure and are therefore susceptible to manipulation by the appointing authority.

307 Section 58.

308 Section 59(1).

309 Section 59(2).

310 Section 59(3).

311 See, Gazette Notices number 3630 and 3631 of 22 May 2003; Number 9935 of 10 December 2004; Number 9933 and 9934 of 2004.

312 Chapter 102, Laws of Kenya.

CHAPTER 9

CONCEPT OF INDEPENDENCE OF THE JUDICIARY

Judicial independence is an important concept that has classically been taken to mean that judges should be free from executive interference. However, in modern times, the concept has correctly been understood to require judges to be free from outside pressure, notwithstanding its source. This essentially means the definition of judicial independence can no longer be restricted to the prohibition of State interference with the judiciary. This is because non-state actors, such as the media and multinational corporations could also pose a threat to judicial independence.

In 1996, the African Commission on Human and Peoples' Rights (hereafter the 'African Commission' or 'Commission') took a major leap in adopting the 'Resolution on the Respect and the Strengthening of the Independence of the Judiciary'.³¹³ Among other things, the resolution calls on African countries to: repeal all legislations that are inconsistent with principles of judicial independence, especially on the appointment and posting of judges; incorporate universal principles of judicial independence in their legal systems; and refrain from taking actions that could threaten the independence and the security of judges and magistrates.³¹⁴

The judiciary in Africa has on numerous occasions been subjected to all forms of intimidation and persecution in the execution of its mandate.³¹⁵ Some countries, especially those governed by the military, have particularly consigned and confounded their judiciaries into impotence. This has had serious negative implications, more so

313 See 'Resolution on the Right to Recourse and Fair Trial' Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights.

314 As above, para 1.

315 N Udombana 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa' (2006) 6 *African Human Rights Law Journal* 312. See also M Rishmawi (ed) *Attacks on justice: The harassment and persecution of judges and lawyers* (2000) (reporting measures taken in different countries that affect judges or undermine the judiciary and the legal profession).

during political transitions, where the harassment of judges ‘makes them look over their shoulders in the dispensation of justice’³¹⁶ and, therefore, decide in favour of the incumbent authorities. Ultimately, such interference has resulted in democracy, good governance and human rights being cumulatively sacrificed on the altar of political expediency.

It is needless to emphasise that a firmly rooted democracy requires a vibrant judiciary that is fully committed to due process and the enhancement of liberal principles and thinking. To a great extent, however, this proposition remains largely mythical in Africa. Rather, it is unfortunate that most political transitions in the continent neglect the important role of the judiciary. Whereas the challenges confronting Africa’s democratic transitions are complex and include the difficulty in entrenching constitutionalism, focus has generally been on elections, political parties and economic (mis)performance. Consequently, in the event of a troubled political transition, such as the one that obtained in Kenya in 2007, the judiciary cannot be called upon or even relied on, to effectively mediate.³¹⁷

A robust judicial system is unquestionably crucial to the thriving of democracy and to the successful negotiation of political transitions. South Africa, for example, has ably deepened its transition to democracy due to, among other things, its resolve to entrench principles that guarantee and encourage judicial independence. Conversely, Kenya almost succumbed to the 2007 post-election anarchy because its Judiciary could not be relied on to mediate the political crisis, largely due to its questionable record of accountability, transparency and efficiency.³¹⁸

316 As above, 313.

317 In 2008, Kenya was engulfed in months of civil unrest and political bickering following the declaration of Mr. Mwai Kibaki as the winner of the 2007 poll, contrary to the belief that the chief opposition contender, Raila Odinga, had won. During the civil unrest, at least 1,000 people were killed and 350,000 internally displaced. Consequently, the AU appointed a team of international experts to mediate on the crisis. The team comprised of the former UN Secretary-General, Kofi Annan, and members of the African Panel of Eminent Persons— Graca Machel and former Tanzanian President, Benjamin Mkapa. See *The Daily Nation*, 29 February 2008, available at www.nationmedia.co.ke (last accessed 12 May 2012); *The East African Standard*, 29 February 2008, available at www.eastandard.net (last accessed 12 May 2012).

318 See generally, M Mbondenji ‘The right to participate in the government of one’s

Post-apartheid South Africa embraces a constitutional form, which limits government, circumscribes pure majoritarian democracy, and emphasises judicial independence. Without overstepping its mandate, the country's Judiciary has repeatedly asserted its right to decide pertinent governance questions. In September 1996, for example, the Constitutional Court denied certification to the first text of the country's final Constitution, a clear indication that Government does not possess untrammelled legislative authority.³¹⁹ This decision, among many others that followed soon thereafter, resonates with South Africa's resolve to entrench the doctrine of separation of powers. Indeed, the country's Judiciary has proved its ability to absorb and reconcile political differences; thereby distinguishing the country among its peers and helping it earn the status of Africa's strongest democracy. Undoubtedly, South Africa's Judiciary has succeeded in acting as the pivotal bridge from executive authoritarianism to 'a culture in which every exercise of power is expected to be justified.'³²⁰ This culture is made tenable by a robust Constitution that encourages an empowered judiciary.

ELEMENTS OF JUDICIAL INDEPENDENCE

An empowered judiciary is one that is independent from any form of interference from either state or non-state actors. This independence may be secured by, for example, the charging of judges' salaries on the Consolidated Fund, separation of judiciary from Parliament, security of tenure of office and judicial immunity. It should be noted, however, that complete independence, especially from government, would be extremely difficult because the operation of the judiciary is a government responsibility, hence the reason it is considered to be one of the three arms. This fact notwithstanding, there are certain elements that, if present, would give a strong indication that

country: An analysis of Article 13(1) of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 elections crisis' (2009) 9 *African Human Rights Law Journal*.

319 See *Certification of the Constitution of The Republic of South Africa*, 1996 CCT 23/96, Decided on 1 July 1996, available at <http://41.208.61.234/uhtbin/cgiisirs/20100701113708/SIRSI/0/520/S-CCT23-96> (accessed 1 July 2010).

320 E Mureinik 'A bridge to where?: Introducing the Interim Bill of Rights' (1994) 10 *South African Journal of Human Rights* 32.

the judiciary is independent. Some of these elements are discussed below.

Modes of appointing judges

In many countries, problems with judicial independence begin at the point judges are appointed. Frequently, the process is politicized or dominated by the executive, a majority party in the legislature, or the judicial hierarchy.³²¹ Conversely, an independent judiciary is a 'watertight' system that provides equal employment opportunities to all qualified persons without regard to one's status, age, sex, ethnicity, race or political affiliation. It follows therefore that the criteria for appointing judicial officers should be objective and not motivated by ulterior motives.

Security of tenure

Security of tenure means that a judge cannot be removed from his or her position during a term of office, except for good cause. Such removal would demand formal proceedings with clearly stipulated procedural protections afforded to the affected judicial officer. It is universally accepted that when judges can be easily or arbitrarily removed, they are much more vulnerable to internal or external pressures in consideration of cases.³²² Security of tenure therefore means that, only in exceptional circumstances that are prescribed by the law, may a judge be removed from office.

Financial security/independence

Another element of judicial independence is financial security. Like fear of dismissal, financial fear is a great threat to judicial independence. First, a judge may compromise justice for fear of reduction of his or her salary. Secondly, the judiciary may not be able to pursue justice effectively if its finances are controlled by another entity. The fact that another arm of government is controlling the

321 US Agency for International Development *Guidance for Promoting Judicial Independence and Impartiality* (2002) 39.

322 As above.

funds needed by the judiciary in its operations may be sufficient incentive to make the judiciary bow to its whims or directions.

Structure of government

The structural relationship between the judiciary and the rest of the government inevitably makes judges more or less vulnerable to interference. There usually are two common architectural models that either undermine or enhance judicial independence: A judiciary which is dependent on an executive department, usually the ministry of justice, for administrative and budgetary functions; and a judiciary which is a separate branch of government and has the same degree of self-government and budgetary control over its operations as the executive branch has over its operations. The former system establishes a dependent judiciary while the later is likely to install judicial autonomy and independence.

JUDICIAL INDEPENDENCE UNDER THE 2010 CONSTITUTION

In many respects, the 2010 Constitution reflects most characteristics of an independent judiciary in line with what has been discussed above. For example, article 160(1) of the Constitution categorically states that the judiciary shall be subject only to the Constitution and the law and not the control or direction of any person or authority. Further, the 2010 Constitution provides:

159(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles:

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

...

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

This position is clearly different from what obtained under the repealed Constitution in the sense that the latter had no provision that expressly attributed judicial authority to the people of Kenya. Another notable departure in the new Constitution relates to the mode of appointment of the CJ and Deputy Chief Justice (DCJ), whereby the President cannot unilaterally appoint without the approval of the National Assembly.³²³ The new Constitution has also improved on the provisions relating to the criteria for appointment of judges,³²⁴ their tenure,³²⁵ as well as their removal from office.³²⁶

The 2010 Constitution also provides for the establishment of a Judiciary Fund administered by the Chief Registrar of the Judiciary.³²⁷ The Fund is meant to be used for administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary.³²⁸ Upon approval of judicial financial estimates by the National Assembly, the expenditure of the Judiciary becomes a charge on the Consolidated Fund and the funds are paid directly into the Judiciary Fund.³²⁹

Principally, an independent judiciary in any country has, as its ultimate resolve, the will to foster strong, accountable and efficient institutions. In this regard, the judiciary should take the necessary initiatives to ensure that it asserts its impartiality and commits itself to a raft of reforms aimed at influencing the political transformation of a nation. In the case of South Africa, the Judiciary has gradually evolved a culture of justification whereby any act or omission committed by the Executive or Legislature has to be justified for it to be permissible. The South African Constitutional Court has been at the forefront in ensuring that this culture thrives by interpreting legislation in such a way that they accord with the letter and spirit of the Constitution. Indeed, this is a very important lesson for emerging constitutional democracies, such as Kenya.

323 See article 166(1)(a).

324 Article 166(2).

325 Article 167.

326 Article 168.

327 Article 173(1).

328 Article 173(2).

329 Article 173(4).

For judicial independence to be a reality in Kenya within the context of the new Constitution, the Judiciary should be keen to ensure that, for executive actions to be acceptable, they must pass a constitutional scrutiny that would render them justifiable. Essentially, the Judiciary needs to enjoy greater latitude in 'judicial creativity', something that will enable it to exercise independence from external interference.

The 2010 Constitution has adequate provisions and safeguards for judicial independence. With such provisions, it is improbable that the Judiciary will be left out of the social and political transformation process, unless it is crippled with indolence, corruption, ineptitude and other related vices. In view of this, it is imperative for constitutional and legislative reforms to be taken more seriously. Such reforms should, among other things, permit all the three arms of government, not in the very least the Judiciary, to be equitable partners in the democratisation process.

CHAPTER 10

THE EXECUTIVE

The executive organ of State is a central one. However, it is usually not easy to accurately delineate the real contours of this function. This difficulty is largely because it is often beyond legislation to conclusively anticipate all the executive duties of State. Executive functions are therefore not capable of comprehensive definition, for they are merely the residue of the functions of government after legislative and judicial functions have been taken away.³³⁰ According to Finer 'it is most useful to look upon the executive as the residue legatee, for that explains the mixed nature of its functions and parts.'³³¹ There is a historical explanation for this characteristic of the executive:

In early times, all power, of every kind, rested with one single person, the prince, and he exercised that power with his narrow circle of advisers. They not only executed policy but planned it and sat in judgment. As the movement for responsible government advanced, it caused 'portions of the power to be taken over by other institutions, the remainder itself being subjected to certain norms of constitutional morality and controlled by the new organs'. As thus understood, the executive embraces the whole governmental organisation with the exception of the legislative and judicial organs and includes all officials, high and low – the Head of State, his principal advisers and ministers, as well as the whole body of subordinate officials through whom the laws are administered.³³²

The proper designation of the executive mandate therefore allows for discretion – even silences and abeyances. In other words, the executive mandate entails all else, after the spheres of the judicature and legislature are carved out. There is nonetheless, no harm in attempting a comprehensive list of conventional executive functions. Montesquieu enumerated that the executive ordinarily 'makes peace or war, sends or receives ambassadors, keeps the peace and prevents

330 See Halsbury as cited in Ojwang (n 47 above).

331 Finer *The theory and practice of modern government* 575.

332 Kapur (n 204 above) 575.

invasion'.³³³ He could have had in mind the functions of national defence and the vindication of national sovereignty, diplomacy and international relations, and the maintenance of internal order, peace and tranquility as the principal aspects of the executive responsibility. Other contemporary functions of the executive include: signing of legislation; the provision of essential services such as water, electricity and road infrastructure, health and education services; making of appointments to critical state offices such as cabinet and the judiciary; facilitation of national holidays; annual or periodic address of legislators in their respective houses and members of the public, amongst others.

EXECUTIVE FUNCTION UNDER THE 2010 CONSTITUTION

The term 'executive' usually evinces two connotations. The first denotation is wide contextually; the other is narrow. In the broad sense, the executive is 'the aggregate or totality of all functionaries or agencies which are concerned with the execution of the will of the State'.³³⁴ In the narrow and customary sense of the term, it 'refers only to the Chief Executive Head of State and his advisers and ministers'.³³⁵ Chapter Nine of the 2010 Constitution on the Executive adopts the later approach. It addresses itself mainly to the President, Deputy President, and the rest of Cabinet.³³⁶ The only other key non-Cabinet office mentioned under the chapter substantively is that of the Director of Public Prosecutions (DPP). The other entire executive functions and institutions are provided for elsewhere, for instance, under the chapters on public finance,³³⁷ public service,³³⁸ national security³³⁹ and commissions and independent offices.³⁴⁰

333 Montesquieu (n 246 above) liv. xi, Chap vi, 168.

334 Kapur (n 204 above) 575.

335 As above.

336 Article 130(1).

337 Chapter Twelve.

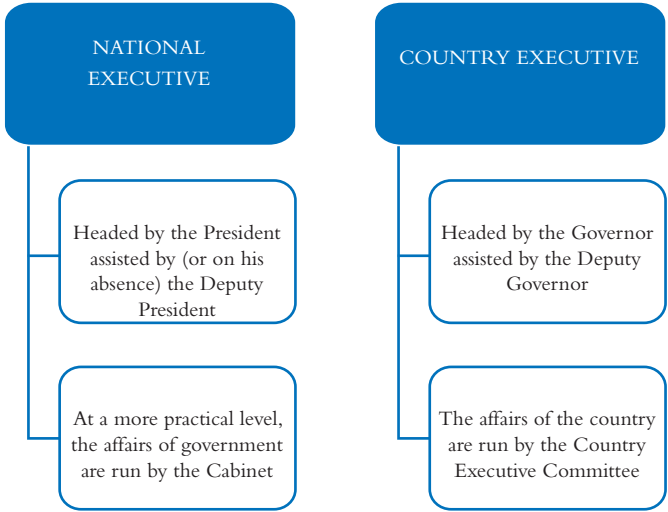
338 Chapter Thirteen.

339 Chapter Fourteen.

340 Chapter Fifteen.

Designation of executive authority

It was true of the repealed constitutional dispensation that ‘a study of the Executive’ was ‘a study of presidential power’.³⁴¹ That adage is no longer entirely accurate. This is because under the framework of the 2010 Constitution, power is separated and devolved, checked and balanced at various levels. For instance, executive authority is now exercised at both national and county levels. The former level takes the form of a national Executive comprising the President, Vice President, and the rest of Cabinet.³⁴² Broadly speaking, the national Executive could also include the public service, security services (and force), constitutional commissions, constitutional offices and other specialized government agencies. The later (county) level is to be overseen by the county executive committee (CEC) consisting of the county governor, deputy county governor and members appointed by the county governor with the approval of the county assembly.³⁴³



341 Chapter Fifteen.
342 Article 130(1).
343 Article 179.

National Executive

The President

The office of the President is entrusted with a number of responsibilities which may be illustrative of the character of the executive function in Kenya. The President's functions fall under the following broad rubrics: state and government, address and reports, legislation, national security and defence, appointments and constitution of offices, Republic, national values, human rights and international obligations; and the dispensation of justice.

State and government

The President of the Republic of Kenya is the Head of State and Government.³⁴⁴ As the Head of Government, the President chairs Cabinet,³⁴⁵ directs and co-ordinates the functions of ministries and government departments.³⁴⁶ It is accepted that by a decision published in the Gazette, (s)he may assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any other law.³⁴⁷

In the capacity as Head of State, the President receives foreign diplomatic and consular representatives,³⁴⁸ confers honours in the name of the people and the Republic,³⁴⁹ signifies national unity,³⁵⁰ and safeguards the sovereignty of the Republic,³⁵¹ among other functions. While there is no clarity (in terms of express constitutional provision) regarding who may transact foreign business such as sign treaties on behalf of the State, nonetheless, like in the repealed Constitution, the new Constitution's 'laconic provisions' and silences 'with respect of questions relating to diplomatic matters, international relations,

344 Article 131(1)(a).

345 Article 132(3)(a).

346 Article 132(3)(b).

347 Article 132(3)(c).

348 Article 132(4)(b).

349 Article 132(4)(c).

350 Article 131(1)(e).

351 Article 131(2)(b).

war and peace'³⁵² in effect may leave the governing principles to be shaped in accordance with common law practices. In typical common law dispensations, such functions are the prerogatives of the Head of State.

Address and report to Parliament and people

Perhaps in the spirit of transparency and accountability, the President is bestowed upon constitutional responsibility to address as well as report to Parliament and the nation on certain occasions. With respect to Parliament, three such moments are expected: firstly, at the opening of each newly elected Parliament;³⁵³ secondly, during a special sitting of Parliament once every year;³⁵⁴ and, thirdly, at any other time.³⁵⁵ It seems to be up to the Head of State in consultation with Parliament to schedule any other appropriate forum to make an address. It is not beyond conventional or contemporary logic to anticipate that future Heads of State may address Parliament during war, national crisis, or natural catastrophe or in the course of celebrating national achievement or pride; during the deliberation of important legislative bills; or to communicate important government policy or agenda.

Besides the oral address to the bicameral Parliament as Head of State, the President, as Head of Government, is also required to submit a report for debate to the National Assembly on the progress made in fulfilling the international obligations of the Republic.³⁵⁶ Most likely, a substantive part of this report shall relate to the obligations incurred because of the numerous international human rights and environmental law instruments ratified by the State and the efforts made at realizing them. In the case of human rights obligations, the general recommendations of the relevant treaty bodies and the respective concluding observations may be useful points of reference during such review and debates.

352 Ojwang (n 47 above).

353 Article 132(1)(a).

354 Article 132(1)(b).

355 Article 132(1)(b).

356 Article 132(1)(c)(iii).

Similarly, once every year, the President is called upon to report, in an address to the nation, on all measures taken and the progress achieved in the realization of national values.³⁵⁷ Such report is to be published in the *Gazette*.³⁵⁸

Legislation

Although the President is no longer an MP, for (s)he neither sits in Senate nor in the National Assembly, the office retains a prominent role in legislation. All Bills require presidential assent to acquire the force of law.³⁵⁹ Within fourteen days after receipt of a Bill, the President may either assent to it³⁶⁰ or refer such Bill back to Parliament for reconsideration, noting any reservations (s)he may have.³⁶¹ Most likely the President's reservation(s) will invariably be taken into account since failure to do so will require that the Bill in question be supported by more members of the house – two-thirds in the case of the National Assembly³⁶² and an additional two-thirds of the delegates in the Senate where the legislative proposal requires the approval of Senate.³⁶³

National defence and security

Three major institutions are envisioned to play a critical role in national security and defence. These are the Kenya Defence Forces (KDF);³⁶⁴ the National Intelligence Service;³⁶⁵ and the National Police Service.³⁶⁶ The presidential function is central to the operations of all of them. In connection with the first institution, the President is its Commander-in-Chief.³⁶⁷ This role is significant

357 Article 132(1)(c)(i).

358 Article 132(1)(c)(ii).

359 See Articles 109(1), 110(5), 111(3), 112(2)(a), 113(3) and 115.

360 Article 115(1)(a).

361 Article 115(1)(b).

362 Article 115(4)(a).

363 See article 115(4)(b).

364 Article 239(1)(a).

365 Article 239(1)(b).

366 Article 239(1)(c).

367 Article 131 (1)(c) & (e).

in three main ways. One, it puts the armed defence forces under civilian control, the President being a democratically elected and accountable civilian. The subordination of the armed forces to civilian oversight is crucial because 'good governance and undue military involvement in political process are incompatible'.³⁶⁸ The two cannot coexist politically in a useful way because of the following massive advantages enjoyed by the military over civilian organisations:

Firstly, a marked superiority in organisation and resources, secondly, a monopoly of arms, and thirdly, a highly emotionalized symbolic status that supposedly invests the military with the status of 'guardianship' of the state (and thus superiority over the constitution).³⁶⁹

It is thus pertinent that 'a civilian government must retain supremacy over the military'.³⁷⁰ The 2010 Constitution therefore does well to establish a 'civilian-military relationship that reflects the overriding principle of civilian supremacy and the need for the accountability of the military to democratic institutions'.³⁷¹ Two, the involvement of the presidency at the apex of the defence institution enables the President have full control of foreign relations, for national defence is central to this mandate. Finally, the location enables the person of the President to consult effectively and make informed decisions before declaring a state of emergency³⁷² or war³⁷³ or assuming a state of peace.

In the capacity as the chairperson of the National Security Council,³⁷⁴ the President impacts directly on all the aforementioned security institutions. Thus, the Constitution does not act in vain when placing the responsibilities of ensuring national order and defence of territorial integrity of State in the office of the President.

368 Hatchard, Ndulo & Slinn (n 81 above) P 240.

369 See Hatchard, Ndulo & Slinn (n 81 above) 251.

370 Hatchard, Ndulo & Slinn (n 81 above) 240.

371 Hatchard, Ndulo & Slinn (n 81 above) 251.

372 Article 132(4)(d).

373 Article 132(4)(e).

374 Article 131(1)(d). As per article 240 of the 2010 Constitution, the Council consists of – the President, Deputy President, Cabinet secretaries for defence, foreign affairs and internal security, AG, Chief of KDE, Director General of NIS, and Inspector General of National Police Service.

For the office holder has the requisite control of relevant security organisations.

Appointments and constitution of offices

As the office situated at the pinnacle of the Executive, the presidency plays a vital role in the staffing of the organs of State. With respect to State offices in the Executive, like is the tradition in most States, the President has the power to nominate and, with the approval of the National Assembly, appoint: Cabinet secretaries; the AG; the Secretary to the Cabinet; Principal Secretaries; high commissioners, ambassadors and diplomatic and consular representatives; amongst others.³⁷⁵ The same appointing authority may dismiss these State officers. In the Judiciary, the President has the power to appoint the CJ and the DCJ, though, in accordance with the recommendations of the JSC and subject to the approval of the National Assembly.³⁷⁶ The President in accordance with the recommendation of the JSC appoints the other judges.³⁷⁷ In addition to appointing certain persons to public offices, the President may – with the recommendation of the Public Service Commission (PSC) – also establish an office in the public service.³⁷⁸

A remarkable feature of the 2010 Constitution is its consistent mistrust for absolute power and its wielders. Unlike in the repealed Constitution, almost all appointive positions require the involvement (other than the presidency) of at least one more institution or office. In certain instances, a different body nominates, quite another approves, before the President appoints. The President may both nominate and appoint persons to certain offices, although, invariably, National Assembly approval is often required. Below is a table detailing the authorities involved in recruiting key State officers.

375 Article 132(2).

376 Article 166(1)(a).

377 Article 166(1)(b).

378 Article 132(4)(a).

POSITION	NOMINATING/ RECOMMENDING BODY	APPROVING BODY	APPOINTING BODY
Cabinet Secretaries [Art 132(2)(a)]	President	National Assembly President (in accordance with Art 152)	
The Attorney-General [Art 132(2)(b)]	President	National Assembly	President (in accordance with Art 156)
Secretary to the Cabinet [Art 132(2)(c)]	President	National Assembly	President (in accordance with Art.154)
Principal Secretaries [Art 132(2)(d)]	President from among persons recommended by the Public Service Commission [Art 155(3)(a)]	National Assembly	President (in accordance with Art 155)
High Commissioners, Ambassadors and Consular Representatives [Art 132(2)(e)]	President	National Assembly	President
Director of Public Prosecution [Art 157(2)]		National Assembly	President
Chief Justice [Art. 166(1)(a)]	Judicial Service Commission	National Assembly	President
All other judges [Art 166(1)(a)]	Judicial Service Commission		President

One man and one woman members of the Judicial Service Commission (not being lawyers) to represent the public [Art 171(2)(h)]	President	National Assembly	President
Chairperson of the Commission on Revenue Allocation [Art 215(2)(a)]	President	National Assembly	President
Two members of the Commission on Revenue Allocation [Art. 215(2)(b)]	The political parties represented in the National Assembly according to their proportion of members in the Assembly		President
Five members of the Commission on Revenue Allocation [Art. 215(2)(c)]	The political parties represented in the Senate according to their proportion of members in the Senate		President
Principal Secretary in the Ministry responsible for finance [Art. 215(2)(d)]			President
Controller of Budget [Art. 228(1)]	President	National Assembly	President

Auditor-General [Art. 229(1)]	President	National Assembly	President
Chairperson of the Salaries Remuneration Commission [Art. 230(2)(a)]			President
Members of the Salaries Remuneration Commission [Art. 230(2) (a-e)]	The nominating bodies differ as provided under the Article. They include the commissions outlined under sub- art. (b), umbrella bodies under sub-art. (c), the Cabinet Secretary responsible for Finance, the Attorney- General and the Cabinet Secretary responsible for Public Service		President
Members of the Public Service Commission [Art 233(2)]		National Assembly	President
Personal staff of the President [Art 234(4)]			President or the PSC
Inspector- General of the National Police Service [Art 245(2)(a)]		Parliament	President

Deputy Inspector General of the National Police Service [Art 245(3)]	National Police Service Commission		President
Members of the National Police Service Commission [Art 246(2)(a)]			President
Chairperson and members of a commission and the holder of an independent office [Art 250(2)]	In a manner prescribed by the national legislation	National Assembly	President
Chairperson and members of the Salaries and Remuneration Commission [Art 25(3) Sixth schedule]		National Assembly	President subject to the National Accord and Reconciliation Act and after consultation with the Prime Minister. (applies only where legislation referred to under Art 250 is not in force)

Republic, national values, human rights and international obligations

Part of presidential responsibility is to secure the Republic, promote national values, protect human rights and ensure adherence to the State's international obligations. These duties are quite apparent as the

Constitution obligates the President to respect, uphold and safeguard its provisions;³⁷⁹ safeguard the sovereignty of the Republic;³⁸⁰ promote, enhance and symbolize the unity of the nation;³⁸¹ promote respect for the diversity of the people and communities of Kenya;³⁸² and ensure the protection of human rights and fundamental freedoms and the rule of law.³⁸³ Once every year, the President is required to report – both through publication in Gazette and in an address to the nation – on all the measures taken and the progress achieved in the realisation of the national values.³⁸⁴ In similar vein, through the actions of the relevant cabinet secretaries, the President is called upon to ensure that the international obligations of the Republic are fulfilled.³⁸⁵

Dispensation of justice

The presidency makes forays into the justice process through the power of mercy. Any person may petition him/her to exercise this power.³⁸⁶ Acting in accordance with the advice of the Advisory Committee on the Power of Mercy (Advisory Committee),³⁸⁷ the President may:

- (a) grant a free or conditional pardon to a person convicted of an offence;
- (b) postpone the carrying out of a punishment, either for a specified or indefinite period;
- (c) substitute a less severe form of punishment; or

379 Article 131 (2)(a).

380 Article 131 (2)(b).

381 Article 131 (2)(c).

382 Article 131 (2)(d).

383 Article 131 (2)(e).

384 Article 132(1)(c)(i) & (ii).

385 Article 132(5).

386 Article 133(1). However, according to section 19(2) of the Power of Mercy Act, a petition shall not be permitted where – ‘(a) the person for whose benefit it is made, is on probation or serving a suspended sentence; or (b) an application for any judicial remedy is pending before a court’.

387 Published by Kenya Gazette Supplement No 108 (Acts No 21). It is important to note that article 133(4) of the 2010 Constitution provides: ‘The Advisory Committee may take into account the views of the victims of the offence in respect of which it is considering making recommendations to the President’

(d) remit all or part of a punishment.³⁸⁸

The Advisory Committee, an unincorporated body,³⁸⁹ comprises the AG who is the chairperson;³⁹⁰ the Cabinet Secretary responsible for correctional services; and seven other members³⁹¹ serving on part-time basis.³⁹² In addition to advising and making recommendations to the President on the exercise of power of mercy, the Committee is required to – undertake or commission research on matters relating to the power of mercy; educate persons in correctional services on the power of mercy and procedures relating to applications for its exercise; carry out any necessary investigations required to make a determination on a petition for power of mercy; educate the public on the nature and implications of the power of mercy; *et cetera*.³⁹³

THE PRESIDENT AND PREROGATIVE POWERS

Blackstone³⁹⁴ argued that the royal prerogative was ‘that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity ...’. Thus, ‘if once any prerogative of the Crown could be held in common with the subject, it would cease to be prerogative any more’.³⁹⁵ It is sometimes thought that on attainment of republican status in 1964 the President in Kenya inherited all the prerogative powers of the Queen. In practice, however, this proposition meets with real difficulties creating doubts as to whether the concept of prerogatives prominent in the common law tradition has ever had a place in Kenya. Items conventionally subject to prerogative authority in the common law have (in Kenya) since been legislated by Parliament and the Constitution robbing from them their very inert attribute; for prerogatives are hardly expressly articulated but

388 Article 133(1).

389 See section 5(1), the Power of Mercy Act.

390 Section 5(1)(a), Power of Mercy Act.

391 Article 133(2), 2010 Constitution. See also section 5(1)(b) of the Power of Mercy Act.

392 Section 5(3), Power of Mercy Act.

393 Section 14, Power of Mercy Act.

394 See Blackstone Commentaries on the law of England.

395 Cited from Parpworth (n 18 above).

rather are established by practice and convention. It may therefore remain accurate that:

The formal enactment of common law prerogatives effectively changed their character into a wholly novel species of prerogatives. They ceased to belong to the unwritten common law, and their scope was delimited by written law, such that they appear to fetter the sovereign's discretion. If this interpretation is taken, then it must be the case that the prerogative had been transformed from common law character to constitutional prerogatives, or a special category of prerogative powers.³⁹⁶

The resulting constitutional prerogatives – even in the new dispensation – are susceptible to other checks such as judicial review and parliamentary supervision. There are also concerns that the Queen's prerogatives exercised in a remote territory such as Kenya during imperialism could not have been as extensive as what obtained in Britain. As Ojwang rightly demonstrates, the Monarch's representatives in Kenya, believed to have bequeathed these powers, did not exercise the prerogatives in the common law sense.³⁹⁷ This school holds that the colony and the protectorate were only extensions of the area of effectiveness of British sovereignty, which itself revolved around the authority of the Monarch. The colonial time thus created a condition in which the prerogative must bare an appearance somewhat different from the common law understanding. It may however be conceded that presidential prerogatives may still be applicable in diplomatic matters, international relations, war and peace.

IMMUNITIES OF THE PRESIDENT

Ghai and McAuslan argued that the repealed Constitution gave the President wide immunity from legal processes in the sense that no criminal or civil proceedings could be instituted against him/her in respect of anything done or omitted to be done in the course of duty. The immunity lasted only so long as the beneficiary was

396 WV Mitullah 'Exercise of executive powers in Kenya: The case of the prerogative of mercy' in M Odhiambo, O Ambani & WV Mitullah (eds.) *Informing a constitutional moment: Essays on constitution reform in Kenya* (2005) 7.

397 As above.

President, and the period of limitations did not run in the course of this procedural immunity.³⁹⁸ The essence of the rule of immunity is to enable the President to discharge better his functions and to maintain the dignity of his office.³⁹⁹

Although the idea of immunities is retained under the new constitutional order the scope of the immunity has been reduced. In particular, the President is no longer exempted from criminal litigation under treaty law, where the State has ratified international obligations that prohibit such immunity.⁴⁰⁰ The High Court has already asserted that not even the Head of State may escape arrest and prosecution under the framework of the Statute of the International Criminal Court,⁴⁰¹ which treaty is applicable to Kenya.

ELECTIONS OF THE PRESIDENT

Save for unforeseeable circumstances such as resignation, death or censure of the President, presidential elections are ordinarily envisioned to accompany general elections of Members of Parliament held on the second Tuesday of August, every fifth year.⁴⁰² A person qualifies for nomination as a presidential candidate if the person – is a citizen by birth; is qualified to stand for election as an MP; is nominated by a political party, or is an independent candidate; and is nominated by not fewer than two thousand voters from each of a majority of the counties.⁴⁰³ Moreover candidates for election as President and Deputy President must be holders of a degree from a university recognised in Kenya.⁴⁰⁴ Persons who owe allegiance to foreign states and public officers, other than the President, Deputy President and Members of Parliament, are disqualified from taking part in presidential nominations.⁴⁰⁵

398 Ghai & MAuslan (n 78 above) 232.

399 As above.

400 Article 143(4).

401 Kenya Section of the International Commission of Jurists v Attorney General & Another, e KLR 2011.

402 Article 136(2). See also article 146 of the 2010 Constitution regulating vacancy in the office of the President.

403 Article 137(1), Constitution; also section 23, Elections Act, Chapter 24 of 2011.

404 Section 22(1), Elections Act, Chapter 24 of 2011.

405 Article 137(2), Constitution; also section 23, Elections Act, Chapter 24 of 2011.

During these elections, all persons registered as voters for the purposes of parliamentary elections are entitled to vote; and the poll shall be taken by secret ballot.⁴⁰⁶ Where two or more candidates are nominated for the elections, the democratic process shall be held in every constituency.⁴⁰⁷

For a candidate to be declared elected as President (s)he has to garner more than half of all the votes cast in the election; and at least twenty-five per cent of the votes cast in each of more than half of the counties.⁴⁰⁸ If no candidate attains this threshold, then fresh elections are held between the candidates who receive the greatest number of votes where these are more than one or between the candidate who receives the greatest number of votes and the one with the second greatest number of votes.⁴⁰⁹ The candidate who receives the most votes in the fresh election shall be declared elected as President.⁴¹⁰

A presidential election shall be cancelled and a new election held if: no person has been nominated as a candidate before the expiry of the period set for the delivery of nominations; a candidate for election as President or Deputy President dies on or before the scheduled election date; or a candidate who would have been entitled to be declared elected as President, dies before being declared elected as President.⁴¹¹ In the event of cancellation of presidential elections, a new election shall be held within sixty days after the date set for the previous presidential election.⁴¹²

Within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission is required to declare the result of the election as well as deliver a written notification of the result to the CJ and the incumbent President.⁴¹³

406 Article 138(3).

407 Article 138(1) & (2).

408 Article 138(4).

409 Article 138(5) & (6).

410 Article 138(7).

411 Article 138(8).

412 Article 138(9).

413 Article 138(10).

By way of petition in the Supreme Court, any person may challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.⁴¹⁴ Such a dispute has to be determined within fourteen days after the filing of the petition and the Supreme Court's decision in this regard is final.⁴¹⁵ If the Supreme Court determines the election of the President-elect to be invalid, a fresh election has to be held within sixty days after the determination.⁴¹⁶

The normal presidential term runs from the date on which the President is sworn in and ends when a new person next elected President is sworn in.⁴¹⁷ A person shall not hold office as President for more than two terms.⁴¹⁸

THE DEPUTY PRESIDENT

The 2010 Constitution introduces the office of the Deputy President. The Deputy President is the principal assistant of the President who shall deputise for the President in the execution of his/her functions⁴¹⁹ and perform other assigned duties.⁴²⁰ This new position enjoys far superior status than the Vice President under the repealed Constitution for at least three major reasons. Firstly, the occupant of the office is a person qualified for nomination for election as President.⁴²¹ Secondly, ideally, the Deputy President is not a mere appointee of the President but shares in the popular mandate of the superior. Each candidate in a presidential election is required to nominate a candidate for Deputy President⁴²² and the two are presented for election as a package. The Independent Electoral and Boundaries Commission (IEBC) would then declare the candidate nominated by the person who is elected as the President to be

414 Article 140(1).

415 Article 140(2).

416 Article 140(3).

417 Article 142(1).

418 Article 142(2).

419 Article 147(1).

420 Article 147(2).

421 Article 148(1).

422 Article 148(1).

elected as the Deputy President.⁴²³ However, when a vacancy occurs in the office of the Deputy President, the President shall nominate another person who has to be voted by the National Assembly.⁴²⁴ Finally, this status enables the Deputy President to act when the President is absent or is temporarily incapacitated, and during any other period that the President decides.⁴²⁵ The Deputy President may also continue with the President's term when a vacancy occurs in that office.⁴²⁶

A vacancy in the office of the Deputy President may occur when the occupant assumes the office of the President, resigns, dies or is removed from office.⁴²⁷ Removal from office is possible on the ground of physical or mental incapacity to perform the functions of the office; or on impeachment – on the ground of a gross violation of constitutional or legal provisions; where there are serious reasons to believe that the Deputy President has committed a crime under national or international law; or for gross misconduct.⁴²⁸ A person is allowed only two terms as Deputy President.⁴²⁹

CABINET AND CABINET SECRETARIES

The President, the Deputy President, the AG and between fourteen and twenty-two cabinet secretaries⁴³⁰ make up Cabinet. Cabinet secretaries are appointed by the President but with the approval of the National Assembly.⁴³¹ Just as the National Assembly plays a role in the appointment of Secretaries, it could also take part in their dismissal. Through an elaborate procedure provided by the Constitution, the National Assembly may pass a motion requiring the President to dismiss a cabinet secretary on the grounds of gross

423 Article 148(3).

424 Article 149(1).

425 Article 147(3).

426 Article 146(2).

427 Article 148(6).

428 Article 150(1). According to article 150(2) of the Constitution, the provisions of articles 144 and 145 relating to the removal of the President shall apply, with the necessary modifications, to the removal of the Deputy President.

429 Article 148(8).

430 Article 152(1).

431 Article 152(2).

violation of the law; where there are serious reasons for believing that the cabinet secretary has committed a crime under national or international law; or for gross misconduct.⁴³²

Cabinet secretaries are drawn from without Parliament⁴³³ in line with the principle of separation of powers. In the course of their duties however, they may be required to attend before a committee of the National Assembly or the Senate and answer any question concerning matters for which they are responsible.⁴³⁴ Further, cabinet secretaries are mandated to provide Parliament with full and regular reports concerning matters under their control.⁴³⁵ The ultimate administration of government departments is in the hands of Principal Secretaries.⁴³⁶

The architecture of Cabinet is such that it hinges upon the office of Secretary to the Cabinet. This is a position in the public service that has charge of the Cabinet office, arranges the business as well as keeps the minutes of Cabinet and conveys the decisions of the Cabinet to appropriate persons or authorities.⁴³⁷ The President yet again appoints the holder of the office.⁴³⁸

CABINET RESPONSIBILITY TO THE PRESIDENT

In terms of responsibility, the 2010 Constitution requires that cabinet secretaries be accountable individually and collectively to the President. This style of cabinet accountability – to the President rather than to Parliament – is a novel constitutional idea and it remains unclear what exactly it entails.

In the previous regime it was the principle of collective responsibility to Parliament, traditionally known to the common law, which was provided for. The governance device was borrowed from the UK where government operates largely on the basis of unwritten constitutional principles. This convention, which obligates

432 Article 152(6).

433 Article 152(3).

434 Article 153(3).

435 Article 153(4)(b).

436 See article 155.

437 Article 154(3).

438 Approval of the National Assembly is also mandatory.

members of Cabinet to identify with agreed government policy regardless of their initial personal affiliations, is useful in presenting a united front in the usually critical House of Commons. It serves to conceal differences of opinion amongst members of Cabinet thus offering no 'weak links' or 'fault lines' where attack on government may be concentrated. The tradition is therefore useful as a shield and defence strategy for the government of the day. Its essence has been ably articulated:

Collective responsibility ... requires of the cabinet that it presents a united front to the world at large. In other words, differences of opinion which may have surfaced at the formative stage of government policy during the course of cabinet discussions are not to be acknowledged in any public pronouncements. Once a policy has been decided upon at cabinet level, the members of the cabinet are obliged to support and defend that policy whenever it is necessary to do so. If they feel unable to meet this obligation, the convention requires them to resign. Such a course of action is considered necessary since division within the cabinet can have a destabilizing effect upon the government.⁴³⁹

While the tradition of collective responsibility evolved without express constitutional protection in England, in Kenya, the principle had prior to the 2010 Constitution sought constitutional expression. The repealed Constitution required that members of Cabinet be collectively responsible to the National Assembly for all things done by or under the authority of the President or the Vice-President or any other Minister in execution of his office.⁴⁴⁰ The principle had to cede ground for the new architect of government pegged on near-complete separation of powers.

THE ATTORNEY GENERAL

Compared to the repealed Constitution the mandate of the new AG is thin and authority narrow. For example, the AG is no longer an *ex officio* MP,⁴⁴¹ and has no authority over (all) public prosecutions.⁴⁴² In terms of hierarchy and significance however, the AG's office may only

439 Parpworth (n 18 above) 240.

440 Section 17(3).

441 Article 240(2)(f).

442 This mandate now falls under the Office of the DPP, discussed below.

be second to that of the CJ in the legal profession.⁴⁴³ The AG remains the principal legal advisor to Government,⁴⁴⁴ and ‘it can be said that the AG bears the mantle of the “chief lawperson” of Government in its diverse dimensions’.⁴⁴⁵ Thus, ‘the various departments of the Government have the liberty to seek the AG’s opinion on any legal question of relevance to their day-to-day operations’.⁴⁴⁶

The AG is a member of Cabinet,⁴⁴⁷ JSC⁴⁴⁸ and National Security Council, and is bestowed upon authority to represent Government in civil legal proceedings affecting it.⁴⁴⁹ The AG may also, with the leave of the court, appear as a friend of the court in any civil proceedings which the Government is not a party.⁴⁵⁰ It is incumbent upon this office to promote, protect and uphold the rule of law as well as defend the public interest. The AG may delegate this power to other persons or subordinate officers by general or specific instructions.⁴⁵¹

The AG is nominated and appointed by the President, but the approval of the National Assembly during such process is mandatory.⁴⁵² Although article 156 of the 2010 Constitution which establishes this office is silent on the removal of the office holder, it is possible that the provisions of article 75 on the general conduct and discipline of State officers may be invoked in the future if it becomes necessary to censure an AG. This article renders one subject to disciplinary procedures where s/he acts in any conflict between personal interests and public official duties, compromises any public interest in favour of a personal interest or conducts self in a manner that is demeaning to such office. It may be well within parliamentary power to instill such disciplinary measures where called for. It is also probable that being an office that offers almost personalized legal

443 Going by article 156(3), the qualification for appointment as AG are the same as for appointment to the office of Chief Justice.

444 Article 156(4)(a).

445 *Re the Matter of the Interim Independent Electoral Commission* [2011] eKLR.

446 As above.

447 Article 152(1)(c).

448 Article 171(2)(e).

449 Article 156(4)(b).

450 Article 156(5).

451 Article 156(7).

452 Article 156(2).

advice to the government of the day, the AG may be dismissed at the whim by the President. The definite legal position may however have to await the fullness of practice and convention or subsequent enactments.

DIRECTOR OF PUBLIC PROSECUTIONS

For the first time in Kenya's constitutional history there is established an independent office of the DPP.⁴⁵³ The DPP has a clear mandate to discharge the responsibilities of the office independently. The State officer

Shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.⁴⁵⁴

A number of measures are enacted to guarantee this independence. First, the candidate for the office is nominated and appointed by the highest ranking State officer, the President, and has to be approved by the National Assembly.⁴⁵⁵ Second, the qualifications for appointment as DPP are high. They are the same as for the appointment of a High Court judge.⁴⁵⁶ Third, the DPP enjoys a secure tenure, at least during the eight-year term.⁴⁵⁷ Removal of the DPP is only legally possible after a constitutional tribunal⁴⁵⁸ establishes either that the office bearer is unable to perform the functions of the office due to mental or physical incapacity; or non-compliance with the constitutional principles of leadership and integrity (Chapter Six); bankruptcy; incompetence; or gross misconduct or misbehavior.⁴⁵⁹ Fourth, the office has ultimate authority over criminal proceedings in that the DPP has the power to institute and undertake criminal proceedings against any person before any court (other than a court

453 Article 157(1).

454 Article 157(10).

455 Article 157(2).

456 Article 157(3).

457 Article 157(5).

458 See article 158(4).

459 Article 158(1).

martial) in respect of any offence alleged to have been committed;⁴⁶⁰ and to take over and continue any such proceedings commenced in any court that have been instituted or undertaken by another person or authority.⁴⁶¹ The DPP may also discontinue at any stage before judgment is delivered any criminal proceeding commenced by the same office or taken over.⁴⁶²

In the repealed constitutional order, equivalent powers of the AG relating to prosecution were almost absolute. For example, the AG could take over or terminate any criminal proceedings without offering explanations to any institution. Under the 2010 Constitution however, the DPP can only take over criminal litigation initiated by another person with permission of the person in question or authority.⁴⁶³ The power to enter a writ of *nolle prosequi* has to 'have regard to the public interest, the interests in the administration of justice and the need to prevent and avoid abuse of the legal processes.'⁴⁶⁴ In other words, now the DPP has to seek permission of the court before which the case is being prosecuted before discontinuing it.⁴⁶⁵

Finally, the DPP has power sufficient to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct.⁴⁶⁶

It is useful to note that the DPP may perform any of his functions or powers in person or through officers acting on his instructions.⁴⁶⁷

COUNTY EXECUTIVE

As highlighted above, the 2010 Constitution has dispersed executive authority to the 47 counties named under the First Schedule. Although the national government retains certain critical functions,

⁴⁶⁰ Article 157(6)(a).

⁴⁶¹ Article 157(6)(b).

⁴⁶² Article 157(6)(c).

⁴⁶³ Article 157(6)(b).

⁴⁶⁴ *Republic v Enock Wēkesa and another* [2010] eKLR. See article 157(11), 2010 Constitution.

⁴⁶⁵ See article 157(8).

⁴⁶⁶ Article 157(4).

⁴⁶⁷ Article 157(9).

it is no longer possible to fully define the executive mandate without reference to county governments. Under the Fourth Schedule the county governments are charged with the following functions – agriculture; county health services; control of pollution; cultural activities; county transport; animal control and welfare; trade development and regulation; county planning and development; pre-primary education, village polytechnics, home craft centres and childcare facilities; implementation of certain government policies on natural resource and environment conservation; county public works and services; fire fighting services and disaster management; control of drugs and pornography among others. It is however possible that a function or power of government at one level may be transferred to a government at the other level by agreement between the governments involved. Parliamentary legislation⁴⁶⁸ now provides for a mechanism of such transfer of functions and powers.⁴⁶⁹

Just like the national government, the design of county governments respects the principle of separation of powers. While the county assembly originates policy,⁴⁷⁰ it is the CEC that runs executive functions. Each CEC has power to implement county legislation and national laws to the extent that these permit. The CEC is also charged with managing and coordinating the functions of the county in addition to performing any other functions conferred by law.⁴⁷¹ The CEC may also propose legislation for consideration by the county assembly.⁴⁷² It is further expected of the CEC to provide the county assembly with full and regular reports on matters relating to the county.⁴⁷³

The governor assisted by the deputy governor heads the CEC. The governor appoints the other members – who shall be one-third of the number of members of the county assembly where the

468 Intergovernmental Government Relations Act, 2012.

469 As per articles 187 and 200, 2010 Constitution.

470 See article 177(1).

471 Article 183(1).

472 Article 183(2).

473 Article 183(3).

assembly has less than thirty members or ten members in the case of assemblies with more than thirty members.⁴⁷⁴

County governments are expected to decentralize their services even further.⁴⁷⁵ One way of doing this is through the Urban Areas and Cities Act,⁴⁷⁶ which provides for a method of classifying certain areas as urban or cities and their governance and management.⁴⁷⁷ These administrations should incorporate participation by the residents.⁴⁷⁸ Under this scheme, the county governor may, on the resolution of the county assembly, confer the status of a municipality or town on a town or area (respectively) that meets the set out criteria.⁴⁷⁹ According to the Act, a town is eligible for the conferment of municipal status if it has: a population of at least two hundred and fifty thousand residents according to the final gazetted results of the last population census; an integrated development plan; demonstrable revenue collection or revenue collection potential; demonstrable capacity to generate sufficient revenue to sustain its operations; the capacity to effectively and efficiently deliver essential services to its residents as provided in the First Schedule; institutionalized active participation by its residents in the management of its affairs; sufficient space for expansion; infrastructural facilities, including but not limited to street lighting, markets and fire stations; and a capacity for functional and effective waste disposal.⁴⁸⁰ Similarly, an area is eligible for the grant of the status of a town if it has a population of at least ten thousand residents; demonstrable economic, functional and financial viability; the existence of an integrated development plan; the capacity to effectively and efficiently deliver essential services to its residents as provided in the First Schedule; and sufficient space for expansion.⁴⁸¹

The President may, on the resolution of the Senate, confer the status of a city on a municipality that has a population of at least five

474 Article 179(3).

475 Article 176(2).

476 Chapter 13 of 2012.

477 Section 3 of the Act.

478 Section 3 of the Act.

479 Section 9(1), and 10(1).

480 Section 9.

481 Section 10.

hundred thousand residents in addition to meeting conditions similar to those stated above with respect to conferment of municipality status.⁴⁸² City status may nonetheless still be granted to an area if it is considered to have significant cultural, economic or political importance.⁴⁸³

Devolution and conflict management

Critics of devolution often argue that the system is perpetually prone to conflicts and challenges of coordination. Where wrongly structured, the system may ‘provide an opportunity for political mobilization on the divisive base of ethnicity or religion, with potential consequences of political oppression, intolerance and, at the extreme, secessionist movements’.⁴⁸⁴ It is not uncommon for national and sub national governments to differ on the interpretation of laws, the extent of functions and powers or the use of natural resources.

In our case, Parliament has proactively enacted a framework that could in the future forestall such challenges – the Intergovernmental Government Relations Act.⁴⁸⁵ This law establishes at least three critical institutions meant to be forums of consultations, coordination, dispute resolution, and intergovernmental cooperation.⁴⁸⁶ These institutions include: the National and County Government Coordinating Summit (the Summit);⁴⁸⁷ the Council of County Governors (the Council);⁴⁸⁸ and the Intergovernmental Relations Technical Committee (the Technical Committee).

The Summit, which shall be the apex body for intergovernmental relations, comprises (a) the President or in the absence of the President, the Deputy President, who shall be the chairperson; and (b) the governors of the forty-seven counties. The chairperson of the Council shall be the vice-chairperson of the Summit. The

482 Section 5(1).

483 Section 5(2).

484 Hatchad, Ndulo & Slinn (n 81 above) 188.

485 Chapter 2 of 2012.

486 See, section 3 of the Act.

487 Section 7(1).

488 Section 19.

Summit is envisioned to provide a forum for: Consultation and co-operation between the national and county governments; promotion of national values and principles of governance; promotion of national cohesion and unity; consideration and promotion of matters of national interest; consideration of reports from other intergovernmental forums and other bodies on matters affecting national interest; evaluating the performance of national or county governments and recommending appropriate action; receiving progress reports and providing advice as appropriate; monitoring the implementation of national and county development plans and recommending appropriate action; considering issues relating to intergovernmental relations referred by a member of the public and recommending measures to be undertaken by the respective county government; co-ordinating and harmonizing the development of county and national governments policies; facilitating and co-ordinating the transfer of functions, power or competencies from and to either level of government; and performing any other function that may be conferred on it by law or that it may consider necessary or appropriate.⁴⁸⁹

The Act under review also establishes the Council of County Governors, which consists of the governors of the forty-seven counties. Members of the Council shall elect a chairperson and a vice chairperson from amongst their numbers who shall serve for a term of one year and shall be eligible for re-election for one further term of one year. The Council is expected to facilitate tranquility by providing a forum for – consultation amongst county governments; sharing of information on the performance of the counties in the execution of their functions with the objective of learning and promotion of best practice and where necessary, initiating preventive or corrective action; considering matters of common interest to county governments; dispute resolution between counties within the framework provided under the Act; facilitating capacity building for governors; receiving reports and monitoring the implementation of inter-county agreements on inter-county projects; consideration of matters referred to the Council by a member of the public; consideration of reports from other intergovernmental forums on

489 Section 8.

matters affecting national and county interests or relating to the performance of counties; and performing any other function as may be conferred on it by the Act or any other legislation or that it may consider necessary or appropriate.

The Act further provides that agreements between the national government and a county government or amongst county governments shall include a dispute resolution mechanism that is appropriate to the nature of the agreement as well as provide for an alternative dispute resolution mechanism with judicial proceedings as the last resort.⁴⁹⁰ Where an agreement does not provide for a dispute resolution mechanism or provides for one that does not accord with these provisions, any dispute arising shall be dealt with within the framework provided under this Act.⁴⁹¹

The Technical Committee comprising—a chairperson competitively recruited and appointed by the Summit; not more than eight members competitively recruited and appointed by the Summit; and the Principal Secretary of the State department for the time being responsible for matters relating to devolution— is responsible for the day to day administration of the Summit and of the Council. In particular, it is expected to facilitate as well as implement the activities of the Summit and of the Council. The Technical Committee should ideally take over the transition functions. The Technical Committee is equally required by law to convene a meeting of the forty-seven county secretaries within thirty days preceding every Summit meeting; and perform any other function as may be conferred on it by the Summit, the Council or legislation.⁴⁹² A full-fledged secretariat, headed by a Secretary, is established for the Technical Committee.

Election of governor and deputy governor

The 2010 Constitution envisions that the county governor shall be elected directly by the voters registered in the county on the same day as a general election of MPs.⁴⁹³ Save for the first elections under

490 Section 32.

491 Section 32(2).

492 Section 12.

493 Article 180(1).

the new Constitution, this date ideally will be the second Tuesday in August in every fifth year.⁴⁹⁴ The IEBC shall declare the candidate with the majority votes during such elections governor and running mate deputy governor. A governor or a deputy governor may serve for up to only two terms.⁴⁹⁵

A county governor may however be removed from office on the following grounds – gross violation of the Constitution or any other law; where there are serious reasons for believing that the county governor has committed a crime under national or international law; abuse of office or gross misconduct; or physical or mental incapacity to perform the functions of office of county governor.⁴⁹⁶ The office of the county governor shall become vacant if the holder of the office – dies; resigns procedurally; ceases to be eligible to be elected to that office; or is convicted of an offence punishable by imprisonment for at least twelve months.⁴⁹⁷ In case of a vacancy in the governor's position, the deputy governor assumes office till the end of that term. Such is considered a complete term if it runs for at least two and half years.⁴⁹⁸ In the event of a vacancy in both the governor's and deputy governor's positions, it is the speaker of the county assembly that is required to act. In this case, however, elections have to be held within sixty days.⁴⁹⁹

494 Article 180(1).

495 Article 180(7).

496 Article 181(1).

497 Article 182(1).

498 Article 182(3).

499 Article 182(5).

CHAPTER 11

THE LEGISLATURE

Legislative authority is a law-making function vested by the Constitution on the Legislature. Legislatures across the globe take various models depending on the nature and type of government. In some countries such as South Africa, legislative authority is not bestowed upon a single institution.⁵⁰⁰ Rather, it is shared among the three levels of government – national, provincial and local –, which are interdependent in co-operative federalism. The US Constitution vests this authority in Congress, which consists of a Senate and House of Representatives.⁵⁰¹ The US also has State legislatures, which play pivotal roles in making laws that have jurisdiction within their boundaries.⁵⁰² The European Union's (EU) legislative authority is vested in the European citizens and exercised by the European Parliament, which jointly shares the legislative power with the Council of Ministers in matters concerning the annual budget of the EU. In Germany, legislative authority is shared between the Federation and the Lander, with the later operating within the provisions of the Federal laws.⁵⁰³ The Spanish system mounts this authority exclusively on *Cortes Generales* (Parliament) which represents the Spanish people and which is divided into the Congress and Senate.⁵⁰⁴

An adherence to the doctrine of *trias politica* endorsed by both John Locke and French constitutionalist Baron de Montesquieu necessitates that there be a clear demarcation in the functions and powers of the organs of government so that no organ has excessive powers and that there are checks and balances. In many cases the

500 Currie & De Waal *The New Constitutional and Administrative Law* (2001) 130.

501 See Article 1 of the United States' Constitution.

502 The United States of America has States that have their respective government with three branches: legislature, executive and judiciary. The legislative branch, like the federal Legislature, makes laws that have the force of law within the State e.g the Arizona State Legislature.

503 Article 71, German Constitution.

504 Section 66, Spanish Constitution.

demarcation goes beyond just separation of functions and powers and calls for separation of personnel as well. The Legislature in the repealed Constitution did not fully incorporate the separation of personnel, as members of the Executive were also members of Parliament. Significantly, therefore, the 2010 Constitution establishes a Legislature distinct from the other arms of government both in functions and membership. The 2010 Constitution establishes a bicameral Parliament, thereby seeing a return of the Senate that was abolished in 1966.⁵⁰⁵ Each of the houses of Parliament has distinct powers, functions and membership, but the Senate broadly serves as the guardian of devolved government.⁵⁰⁶ Nonetheless, due to some corresponding functions and powers, the 2010 Constitution makes provision for joint sittings of the two houses, and also, provides a conflict resolution mechanism.⁵⁰⁷

The salient feature of the new Legislature, juxtaposed against the repealed Constitution, is how parliamentary oversight role is now enhanced as the Legislature has been disentangled from the Executive. Even though parliamentary power is strengthened, Parliament does not have a *carte blanche* in the exercise of its functions, as its powers are constitutionally defined. The new Constitution envisages a system where legislative authority is shared between the national Legislature and the devolved (County) legislatures.⁵⁰⁸ The national Legislature retains its traditional role of enacting countrywide laws, while the county legislatures serve to implement the national laws and policies within their respective boundaries, and at the same time making laws within their jurisdiction.

505 Article 93(1) of the Constitution of Kenya 2010 establishes a Parliament comprising of National Assembly and Senate.

506 According to Article 96 '(1) The Senate represents the counties, and serves to protect the interests of the counties and their governments. (2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.

(3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments. (4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.'

507 See Articles 107(2) & 113 of the Constitution.

508 The Constitution provides for a devolved arrangement which has seen Kenya divided into 47 counties each with a county executive council and a law-making legislature.

THE NATIONAL LEGISLATURE

The legislative authority of the Republic of Kenya is derived from the people and, at the national level, is vested in, and exercised by Parliament.⁵⁰⁹ Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.⁵¹⁰ It is bicameral, as it comprises a Senate and National Assembly. Whereas the National Assembly represents the people of the constituencies and their special interest at the national level,⁵¹¹ the Senate represents the counties at the national level.⁵¹² This arrangement was deliberately intended to enhance an efficient system of checks and balances, as the two chambers of Parliament serve to limit and control the powers that were traditionally bestowed on the Executive branch of government in the previous constitutional order.⁵¹³

The establishment of a bicameral parliament in the 2010 Constitution is a return to the position at independence where Parliament consisted of two houses – the House of Representatives and the Senate. At independence though, the ruling party at the time, the Kenya African National Union (KANU), viewed the establishment of Senate with disapproval and worked towards its disestablishment, which eventually came to fruition in 1966.⁵¹⁴ The Senate was abolished and senators were absorbed into an enlarged house of representatives. The Kenya Parliament thus became unicameral and remained so until the re-establishment of the Senate in the 2010 Constitution.

It is noteworthy that there is no express designation with regard to which of the two houses of Parliament takes pre-eminence over the other. In Canada, the Senate, whose membership is appointed by the Governor-General with a requirement of balance among

509 Article 94(1).

510 Article 94(2).

511 Article 95 (1).

512 Article 96 (1).

513 The two houses of Parliament, under the new Constitution, play crucial role in exercising 'dual' oversight of State officers including the Executive branch of government, unlike a single parliament which was regularly vulnerable to the manipulation of the Executive.

514 See JH Proctor 'The role of the Senate in the Kenyan political system' (Autumn, 1965) *Parliamentary Affairs*, XVIII.

provinces, has only advisory powers and is therefore considered the weaker house compared to the Federal House of Commons.⁵¹⁵ Similarly, India's second chamber *Rajya Sabha* (the Council of States) whose members are elected by the members of the state legislative assemblies, except for 12 presidential appointees, is considered subordinate to the *Lok Sabha* (House of the People).⁵¹⁶ In the US however, both houses of Congress are regarded as having equal standing.

It should be noted though that in jurisdictions with less powerful second chambers, the electorate often not directly determines their membership. In the US, for example, members of the second chamber, the Senators, are directly elected by voters in the States that they represent and hence the Senate is considered at par with the House of Representatives.⁵¹⁷ Correspondingly, drawing from the situation in the US, both houses of the Kenya Parliament should be considered as having equal status. But, upon close scrutiny of the role, functions and numbers of each of the houses, and given that the Speaker of the National Assembly chairs joint sittings of both houses deputised by the Speaker of the Senate, it emerges that the National Assembly would seem to occupy a higher rank compared to the Senate.⁵¹⁸

To ensure that legislative authority is well exercised, and especially to safeguard against either house overstepping its mandate, article 93 is instructive that National Assembly and the Senate shall perform their respective functions and powers in accordance with what is set out in the Constitution. It is the duty of the courts therefore through the power of judicial review to nullify legislation and all exercise of parliamentary power that is not in conformity with the Constitution.

515 As above.

516 See G Flanz (ed.) *8 Constitutions of the countries of the world* (1997) 53–54.

517 See RE Petersen 'Parliament and Congress: A brief comparison of the British House of Commons and the U.S. House of Representatives' (2005) Congressional Research Service 1–3.

518 Article 107(2) of the Constitution provides that 'at a joint sitting of the Houses of Parliament, the Speaker of the National Assembly shall preside, assisted by the Speaker of the Senate.'

The Structure, Composition and Functions of Parliament

The 2010 Constitution gives exclusive legislative authority to Parliament.⁵¹⁹ It is widely acknowledged, though, that Parliament cannot enact on every issue and as a result it delegates to the Executive powers to make laws in the form of regulations. In the past, however, this approach lent unfettered powers to the Executive. Parliament invariably did not provide sufficient means to check or structure these powers, but rather tended to facilitate their exercise by giving those in whom they were vested power as much discretion as possible to exercise the delegated power.

The 2010 Constitution rectifies the anomaly by requiring that an Act of Parliament or county legislation conferring on any State organ, State officer or person the authority to make provision having the force of law in the country should clearly specify the purpose and objectives for which that authority is conferred.⁵²⁰ The extent of the delegation should also be clearly defined as well as the principles and standards applicable to the law made under the authority.⁵²¹ Under the repealed Constitution, legislative authority was vested in Parliament, which consisted of the National Assembly and the President.⁵²² In the 2010 Constitution, however, Parliament does not consist of the institution of the presidency.

The National Assembly

The National Assembly comprises of a total of 350 members, including the Speaker who is an *ex officio* member. Two hundred and ninety members of these are directly elected from single member constituencies.⁵²³ Provision has been made to redress the gender

519 Article 94(5).

520 Article 95(6).

521 As above.

522 Section 30.

523 Article 97(1) provides that ‘The National Assembly consists of—(a) two hundred and ninety members, each elected by the registered voters of single member constituencies; (b) forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency; (c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and the

inequality that has been a feature of past politics by providing for exclusive women constituencies in which only women can stand for elections. Accordingly, the subsisting forty seven counties will serve as single member constituencies in this regard.⁵²⁴ In addition, specialised seats are reserved for special interest groups including the youth, persons with disabilities and workers.⁵²⁵ The special interest groups will be based on closed party lists.⁵²⁶ Although the 2010 Constitution provides for affirmative action measures to ensure that women, youth and persons with disabilities secure membership in the National Assembly, there is nothing that stops these previously marginalised groups from contesting elections in the open 290 constituency seats.⁵²⁷

The repealed Constitution did not conclusively elaborate the specific roles of the National Assembly. It only vested legislative power of the Republic in the unicameral Parliament.⁵²⁸ As a consequence, the role of Parliament was shrouded in obscurity. In the 2010 Constitution, however, the role of the National Assembly is clearly laid out. Apart from taking part in the process of law making, the National Assembly represents the people of the constituencies through the elected representatives and special interest groups.⁵²⁹ Its core function therefore is to deliberate and resolve the concerns of the people. This is normally done through debates and committees, which make inquiry on matters of national concern to the people. In the repealed constitutional dispensation, 'Question Time' proved quite effective in ventilating the people's concerns. It involved MPs directly asking Cabinet ministers questions pertinent to particular local concerns that directly fell within their portfolios. Although the strict separation of powers adopted in the new Constitution can no longer accommodate question time in the traditional sense,

Speaker, who is an *ex officio* member.'

524 Article 97(1)(b).

525 Article 97(1)(c).

526 Article 90(1).

527 Article 97(2) of the Constitution provides that '(2) Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (a).'

528 Section 30.

529 Article 95(1).

it is hoped that the now strengthened committees in the National Assembly will fill this gap.

The National Assembly determines and supervises revenue allocation, exercises oversight role over the Executive and all State organs, and approves states of declaration of war and extensions of state of emergencies.⁵³⁰ In its role of determining revenue allocation between the two levels of government the National Assembly works in concert with the Senate.⁵³¹ In its oversight role, the National Assembly, if it deems fit, may impeach the President or Deputy President, with the concurrence of the Senate. The National Assembly also takes part in the constitution of State offices for most of the appointments are only completed after parliamentary approval. In South Africa, from where Kenya's Legislature is said to have been moulded, the National Assembly ensures greater representation of the people by providing a national forum for public consideration of issues.⁵³² In addition, the country's National Assembly is also mandated with the discretion to choose the State President.

The Senate

The Senate consists of 68 members. The registered voters in each of the counties directly elect the bulk of this composition, forty-seven Senators.⁵³³ Like in the case of the National Assembly, the 2010 Constitution provides for a balanced platform of representation of the previously underrepresented groups in the Senate. It reserves 16 seats for women, nominated by political parties in accordance with their strength in Parliament.⁵³⁴ In addition, it reserves nomination slots for youth (two members) and persons with disabilities (two members).⁵³⁵ Notwithstanding the fact that seats have expressly been reserved for women, the youth and persons with disability, like every other person, those who fall within these special categories are

530 Article 95(4).

531 See Part 4 of Chapter Twelve of the Constitution.

532 See Section 42(3) of the South African Constitution.

533 Article 98(1)(a).

534 Article 98(1)(b).

535 Article 98(1)(c) & (d).

equally eligible to contest in elections.⁵³⁶ This constitution includes the Speaker, an *ex officio* member.⁵³⁷

The Senate at independence was considered necessary not only to safeguard the autonomy of the regional governments, but also to ensure sufficient representation of minority interests nationally.⁵³⁸ It was recognized that a unicameral national legislature elected on the basis of 'one-man, one-vote' could be emasculated by the then ruling party KANU which openly advocated for centralisation of power in the national Government.⁵³⁹ While drafting memoranda for the establishment of an upper chamber of parliament for a newly independent Kenya, Reginald Maudling, the then Secretary of State for the Colonies, set out the purposes of the Senate to be 'partly to ensure proper representation of geographical views and interests, partly to act as a revising and reforming house, and also, possibly most important, to act as fundamental protector of individual rights and liberties.'⁵⁴⁰

Regrettably, Kenya's initial Senate dismally carried out its role during its short existence especially as the guardian of the Constitution. While constitutional amendments were being made to confer more power on the national Executive and to dismantle constitutional safeguards, party loyalty compromised the independence of the senators, especially those of the then ruling party KANU, who voted as their party had in their lower house. The KANU senators unlike their Kenya Africa Democratic Union (KADU) counterparts saw no need to defend the regional government, whose protection rested in the Senate.⁵⁴¹ Even more startling was that KANU senators did not see it as their duty to question constitutional amendments. In this regard the Chief Government Whip said:

The mandate has been given...to change the Constitution overnight...
It is not up to us to say that we should not change the Constitution.

536 Article 98(1).

537 See Article 98.

538 Minorities were considered principally on the basis of tribe and in this sense minorities were the smaller ethnic groupings.

539 Procter (n 514 above) 390.

540 Procter (n 514 above) 391.

541 As above.

This is a Motion which cannot be accepted by the Government... It cannot be before this House ...if Kenyatta accepts that the Constitution will stay then it will stay, if not it must go, it will go because he is the man who has the mandate of the people...⁵⁴²

On the whole, it was evident the Senate, in its three and a half years of existence, failed to assert its role in the Kenyan political system.⁵⁴³

The 2010 Constitution returns Kenya to this similar position as at independence. It is noteworthy, however, that the Senate in the new Constitution has real control over Government. The incorporation of a devolved government in the Constitution necessitates a national institution to protect the interest of the devolved governments at national level. Consequently, the Senate is meant to represent the counties' interests at national level.⁵⁴⁴ It participates in the law making functions of Parliament by considering, debating and approving Bills concerning counties.⁵⁴⁵ It is arguable that virtually every other Bill concerns counties for every other legislation is eventually exerted at county level. Be it in taxing a people, mining resources, deploying security officers or laying power or Internet cables, these activities happen at least in the jurisdiction of a county.

The need to secure approval for Bills in both houses means that legislation cannot be rushed through Parliament hence protecting the citizens from mediocre legislation. The Senate also determines the allocation of national revenue among counties and exercises oversight over national revenue allocated to the county governments.⁵⁴⁶ Further, the Senate considers and determines any resolution to remove the President and the Deputy President.⁵⁴⁷ In this sense, it is mandated to appoint a special committee to investigate the matter of impeachment, which would thereafter report in 10 days to substantiate or otherwise dispel the allegations. Therefore,

542 Procter (n 514 above) 411.

543 N Stultz 'Parliament in a tutelary democracy: A recent case in Kenya' (1969) 31 *Journal of Politics* 96.

544 Article 96(1).

545 Article 96(2).

546 Article 96(3).

547 Article 96(4).

the Senate is not only expected to be a debating forum but also a policy making body.

Qualifications and disqualifications for election as MP

A person is eligible for election as an MP if (s)he is registered as a voter and satisfies any educational, moral and ethical requirements prescribed by the law.⁵⁴⁸ Generally, one may be nominated as a candidate for an election only if (s)he holds a certificate, diploma or other post secondary school qualification acquired after a period of at least three months study, and recognised by the relevant Ministry.⁵⁴⁹

One may choose to contest either as an independent candidate or a nominee of a political party.⁵⁵⁰ An independent candidate must be supported by at least one thousand registered voters in the respective constituency, in case (s)he is contesting for a National Assembly seat.⁵⁵¹ In the case of election to the Senate, an independent candidate requires the support of at least two thousand registered voters in the county.⁵⁵² Pursuant to the Elections Act, a person qualifies for nomination as an independent candidate for presidential, parliamentary and county elections if (s)he:

- a) has not been a member of any political party for at least three months preceding the date of the election;
- b) has submitted to the Commission on the day appointed by the Commission as the nomination day, a duly filled nomination paper as the Commission may prescribe;
- c) has submitted the symbol that the person intends to use during the election; and
- d) is selected in the manner provided for by law.⁵⁵³

Procedurally, independent candidates have to submit to the IEBC, at least twenty-one days before nomination day, the symbols they

548 Article 99(1)(b).

549 Section 22(1)(b) of the Elections Act (Number 24 of 2011). See also Statute Law (Miscellaneous Amendments) Act, 2012.

550 Article 99(1)(c).

551 Article 99(c)(i).

552 Article 99(c)(ii).

553 Section 33.

intend to use during elections.⁵⁵⁴ The IEBC is mandated to either approve or reject the symbols.⁵⁵⁵ Rejection of a symbol may be on grounds that it:

- (a) is obscene or offensive;
- (b) is the symbol of another candidate or of a political party;
or
- (c) so nearly resembles the symbol of another candidate or political party or any other legal entity registered under any other written law.⁵⁵⁶

With regard to candidates affiliated to political parties, the Elections Act requires political parties to nominate their candidates at least forty-five days before a general election.⁵⁵⁷ In the case of any other election, it is incumbent upon the IEBC to specify the day(s) for nomination.⁵⁵⁸ It is illegal for a political party to substitute its candidate once the nomination of that person has been received by the IEBC.⁵⁵⁹ However, certain circumstances may permit the substitution of a candidate before the date of presentation of nomination papers to the IEBC. These are death, resignation, incapacity or the violation of the electoral code of conduct by the nominated candidate.⁵⁶⁰ Under such circumstances, the political party has a duty to – where applicable – notify the respective candidate prior to substitution.⁵⁶¹

There are various grounds that may disqualify a person from being nominated for election as an MP.⁵⁶² These grounds include situations where a person: is a State officer or other public officer, other than an MP; has, at any time within the five years immediately preceding the date of election, held office as a member of the IEBC; or has not been a citizen of Kenya for at least a period of ten years immediately preceding the date of election. Further, one is ineligible

554 Section 32(1), the Elections Act.

555 Section 32(2), the Elections Act.

556 Section 32(3)(a)–(c), the Elections Act.

557 Section 13(1), the Elections Act.

558 Section 13(3), the Elections Act.

559 Section 13(2), the Elections Act.

560 As above.

561 As above.

562 See Article 99(2)(a)–(g).

if (s)he is a member of a county assembly; or is of unsound mind; is undischarged bankrupt; is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened constitutional provisions relating to leadership and integrity.⁵⁶³ Additionally, the law disqualifies (from the electoral process) any person ‘who directly or indirectly participates in any manner in any public fundraising or harambee within eight months preceding a general election or during an election period.’⁵⁶⁴ This, however, does not apply where the fundraising in question is for a person contesting an election or for a political party.

Vacation of office of MP

The office of an MP becomes vacant if the member dies; or if, during any session of Parliament, the member is absent from eight sittings of the relevant House without permission, in writing, from the Speaker, and is unable to offer a satisfactory explanation for the absence to the relevant committee.⁵⁶⁵ Furthermore, a vacancy can occur if a member is removed from office upon contravention of constitutional provisions on leadership and integrity.⁵⁶⁶ Additionally, if a member resigns in writing to the Speaker, either at the Senate or National Assembly, (s)he ceases to be an MP.⁵⁶⁷ Another ground for losing parliamentary membership is when one resigns or is deemed to have resigned from the party that sponsored him/her to Parliament, or if the member was an independent candidate when (s)he joined Parliament but later joined a political party.⁵⁶⁸ Termination of membership in Parliament is certain where the term of the relevant House ends.⁵⁶⁹

563 As per Chapter Six, 2010 Constitution.

564 Section 26(1), the Elections Act.

565 Article 103(1)(a)–(b).

566 Article 103(1)(c).

567 Article 103(1)(d).

568 Article 103(1)(e).

569 Article 101.

The right of recall

There is a further avenue through which the membership of an MP in Parliament may come to an end – through recall by the electorate.⁵⁷⁰ The right of recall was not articulated in the repealed Constitution and thus is a novel entitlement. While it was largely expected that the electorate would have sufficient power to recall a non-performing representative, the right as currently legislated is wrought with numerous limitations. Firstly, an MP may only be recalled where found, after due process of the law, to have violated the constitutional dictates on leadership and integrity, or to have mismanaged public resources, or in cases where such member is convicted of an offence under the Elections Act.⁵⁷¹ Thus, a recall can only be initiated upon a judgement or finding by the High Court confirming the grounds specified in section 45(2)(a)–(c) of the Elections Act.⁵⁷² Secondly, a recall can only be initiated twenty-four months after the election of the MP and not later than twelve months prior to the next general election.⁵⁷³ Thirdly, a petition to recall an MP can only be filed once a term.⁵⁷⁴ And, finally, a person who unsuccessfully contested an election in the particular term in question cannot file such a petition, directly or indirectly.⁵⁷⁵ Perhaps this provision is meant to reduce cases of witch-hand by losers in electoral processes. In the end, contrary to earlier expectations, the electorate does not have a free hand in recalling an MP who in their estimation is unsuited for leadership.

Procedurally, a petition filed with the IEBC initiates a recall.⁵⁷⁶ Such petition shall be ‘in writing and signed by a petitioner who is a voter in the constituency or county in respect of which the recall is sought and was registered to vote in the election in respect of which the recall is sought.’⁵⁷⁷ An order of the High Court confirming the

570 Article 104.

571 Section 45(2)(a)–(c), the Elections Act.

572 Section 45(3), the Elections Act.

573 Section 45(4), the Elections Act.

574 Section 45(5), the Elections Act.

575 Section 45(6), the Elections Act.

576 Section 46(1), the Elections Act.

577 Section 46(1)(a)–(b), the Elections Act.

grounds for recall enumerated above has to accompany the recall petition.⁵⁷⁸ For it to be valid, a recall petition should specify the grounds for the recall, contain a list of names of at least thirty percent of the registered voters in the respective constituency or county and be accompanied by the prescribed fee.⁵⁷⁹ The list of registered voters should include important information, such as their names, addresses, voter card numbers, national identity card or passport numbers and signatures.⁵⁸⁰ Most importantly, the voters supporting the petition should comprise at least fifteen percent of the voters in more than half of the wards in the county or the constituency, as appropriate.⁵⁸¹ Such voters should also represent the diversity of the people in the county or the constituency as the case may be.⁵⁸²

The IEBC is required to verify the names supporting the petition within thirty days of receiving the list.⁵⁸³ If satisfied, the Commission shall, within fifteen days after the verification, issue a notice of the recall to the Speaker of the relevant House.⁵⁸⁴ The Commission shall then conduct a recall election within the relevant constituency or county within ninety days of the publication of the question.⁵⁸⁵ Prior to conducting a recall election, the IEBC shall frame the question to be determined at the election.⁵⁸⁶ Such a question will be framed in such a manner as to require the answer 'yes' or 'no'.⁵⁸⁷ The Commission shall also assign a symbol for each answer to the recall question.⁵⁸⁸ The questions shall be determined by a simple majority of the voters in the recall election. If the number of voters who concur in the recall election is at least fifty percent of the total number of registered voters in the affected county or constituency,

578 Section 46(1)(c), the Elections Act.

579 Section 46(2)(a)–(c), the Elections Act.

580 Section 46(3), the Elections Act.

581 As above.

582 As above.

583 Section 46(6), the Elections Act.

584 Section 46(7), the Elections Act.

585 Section 46(8), the Elections Act.

586 Section 47(1), the Elections Act.

587 Section 47(2), the Elections Act.

588 Section 47(3), the Elections Act.

the recall election will be deemed to be valid.⁵⁸⁹ If the election results suggest the removal of an MP, the IEBC shall conduct a by-election in the affected constituency or county.⁵⁹⁰ Ironically, the Elections Act permits an MP who has been recalled to run in the by-election.⁵⁹¹

The right of recall is a feature of a democratic society. In Kenya's contemporary constitutional order, this right will to some extent reinforce the sovereignty of the people over their elected officials. However, the opportunity should be protected from abuse as it could potentially 'destroy representative government by restraining energetic MPs, discourage qualified persons from seeking public office, allow the losing political party a second opportunity to win office, encourage frivolous harassment of MPs and permit removal of officers for inadequate reasons.'⁵⁹²

THE LAW-MAKING PROCEDURES OF PARLIAMENT

Exercise of legislative powers

Parliament exercises its legislative powers by passing Bills. The Constitution at independence provided under section 59 that the Bills were required to pass through both Houses, or according to section 61 in cases where the Upper House (Senate) did not amend or pass the Bill within one month of its introduction it would be validly passed by the Lower House only. The Bill was required to be presented to the Governor-General for assent. The provisions of the Independence Constitution establishing a bi-cameral Legislature were repealed and in 1968 when the *majimbo* system was abolished, the Senate that was the house responsible for the matters concerning the devolved governments was also abolished.

Under the new constitutional order, any Bill can originate in the National Assembly.⁵⁹³ Further, any Bill not concerning county governments can only be considered in the National Assembly.⁵⁹⁴

589 Section 48, the Elections Act.

590 Section 47(6), the Elections Act.

591 Section 47(7), the Elections Act.

592 Constitution of Kenya Review Commission (2005) 173.

593 Article 109(2).

594 Article 109(3).

This means that not all Bills have to pass through the two houses of Parliament. Again, any Bill concerning county government can originate in either the National Assembly or Senate.⁵⁹⁵ Article 109(5) of the Constitution is in concert with section 259(2) of the Independence Constitution in so far as a money Bill could only originate from the Lower House. Although the law-making powers of the old Senate were limited to matters of special interest to the people, the need to secure approval for Bills in both houses meant that legislation could not be rushed through Parliament. This system requires that the Bills are greatly considered and one house serves as a check on the other that the Bills are well structured and duly passed.

Bills concerning county government

Bills concerning county governments have to be considered in both houses of Parliament.⁵⁹⁶ They may either be special Bills or ordinary Bills.⁵⁹⁷ Special Bills relate to, among other things, election of members of a county assembly or a county executive or an annual county allocation of revenue. Before either house of Parliament considers a Bill, the Speakers shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill.⁵⁹⁸

Once any Bill concerning county government has been passed by one house of Parliament, the Speaker of that house shall refer it to the Speaker of the other house.⁵⁹⁹ If both houses pass the Bill in the same form, the Speaker of the House in which the Bill originated shall, within seven days, refer the Bill to the President for assent.⁶⁰⁰ It is noteworthy that a special Bill proceeds in the same manner as an ordinary Bill, unless the National Assembly by resolution supported by at least two thirds of its members decides to amend or veto it.⁶⁰¹

595 Article 109(4).

596 Article 110.

597 Article 111 and 112.

598 Article 110(3).

599 Article 110(4).

600 Article 110.

601 Article 111(2).

If a resolution in the National Assembly to amend or veto a special Bill fails to pass, the Speaker shall within seven days refer the Bill, in the form adapted by the Senate, to the President for assent.⁶⁰² This implies that with regard to special Bills the Senate somewhat holds sway.

With regard to ordinary Bills, it is important to point out that, if one house passes a Bill concerning counties, and the second house rejects it, the Bill shall be referred to a mediation committee appointed in accordance with article 113 of the Constitution.⁶⁰³ If, after the originating House has reconsidered a Bill referred back to it in an amended form, that House – passes the Bill as amended, the Speaker of that House shall refer the Bill to the President within seven days for assent.⁶⁰⁴ If such a Bill is rejected it shall be referred to a mediation committee.⁶⁰⁵

One would argue that the rationale for considering county Bills in both houses of Parliament is to strengthen mechanisms for checks, counter-checks and balances in the country's legislative process. This would essentially ensure the regulation of Senate by the National Assembly while at the same time empower Senate to safeguards county governments from national legislation passed in the National Assembly that may potentially be prejudicial to their interests.

Presidential assent and referral

When both houses of Parliament have duly passed a Bill, it is submitted to the President for assent. Ordinarily, the President has fourteen days within which to either assent to the Bill or refer it back to Parliament for reconsideration, noting any reservations

602 Article 111(3).

603 Article 112(1)(a).

604 Article 112(2)(a).

605 Article 112(2)(b). A mediation committee plays the role of an arbiter in a situation where the two houses of Parliament fail to agree on a Bill. The committee attempts to develop a version of the Bill that both Houses will pass. If the mediation committee agrees on a version of the Bill, each House shall vote to approve or reject it. If both Houses approve the version of the Bill proposed by the committee, the Speaker of the National Assembly shall refer the Bill to the President within seven days for assent. But if the mediation committee fails to agree on a version of the Bill within thirty days, or if a version proposed by the committee is rejected by either House, the Bill is defeated, meaning its procession comes to an end. See Article 113, 2010 Constitution.

concerning the legislative proposal in question.⁶⁰⁶ Referrals by the President typically arise due to concerns regarding either procedural or substantive defects in Bills as well as questions as to their constitutionality. A Bill referred back to Parliament for reconsideration may either be amended in light of the President's reservations, or passed a second time without amendments.⁶⁰⁷ In the event Parliament passes the Bill a second time, without amendments, or with amendments that do not fully accommodate the President's reservations, it has to be supported by a vote of two thirds of the members of the National Assembly.⁶⁰⁸ If the Bill requires approval of the Senate, two thirds of the members of Senate will have to support it.⁶⁰⁹

The implication of this is, if Parliament votes to pass a Bill a second time without amendments or makes amendments that do not fully accommodate the President's reservations, but fails to achieve the two thirds threshold, Parliament has no choice but to accommodate the President's reservations. Once a Bill has been resubmitted to the President, he or she must assent to and sign it within seven days if it fully accommodates his or her reservations.⁶¹⁰

If the President fails to assent to the Bill within the required time period then the Bill will be taken to have been assented to on the expiry of that period.⁶¹¹

The 2010 Constitution requires that a Bill passed by Parliament and assented to by the President be published in the Gazette as an Act of Parliament within seven days after assent.⁶¹² The publication in the *Kenya Gazette* serves as a notification to the public. Once published, the Act attains the force of law within fourteen days, unless it is an Act that confers direct pecuniary interest on MPs, in which case it will have to come into force after the subsequent

606 Article 115(1)(a)–(b).

607 Article 115(2)(a)–(b).

608 Article 115(4)(a).

609 Article 115(4)(b).

610 Article 115(5).

611 Article 115(6).

612 Article 116(1).

General Elections.⁶¹³ This approach is a marked departure from what obtained under the repealed Constitution. Section 46(6) of the repealed Constitution mandated Parliament to suspend the coming into force of an Act and also permitted the retrospective application of laws.

COUNTY LEGISLATURES

Central to the organisation of government in Kenya is the principle of devolution. The 2010 Constitution operates two autonomous levels of government: the national government and the county governments. Each county government comprises the county assembly and the CEC.⁶¹⁴ The county assembly is comprised of elected members representing the various wards within the county and has legislative authority conferred upon it.⁶¹⁵ The county assembly has the power to make any laws necessary for or incidental to, the effective performance of the functions and exercise of the powers of the county government as stipulated under the Fourth Schedule to the Constitution.⁶¹⁶ Additionally, a county assembly, while respecting the principle of the separation of powers, may exercise oversight over the CEC and any other county executive organs.⁶¹⁷ It may also receive and approve plans and policies for the management and exploitation of the county's resources and the development and management of its infrastructure and institutions.⁶¹⁸

County governments share executive and legislative functions with the National Government in areas of agriculture, health services, education, transport and communications, veterinary policy, housing and public works just to mention a few.⁶¹⁹ In these areas of shared jurisdiction decisions on the structure and management will have to be based on the principles of shared governance. These areas can be referred to as those in which concurrent powers are vested in both

613 Article 116(2).

614 Article 176(1).

615 Article 185(1).

616 As above Fourth Schedule.

617 As above.

618 As above.

619 As above.

levels of government. The nature of these powers will presumably be detailed in implementing legislation that is to follow as provided for in the Fifth Schedule to the Constitution.

International constitutional practice has shown that distribution of functions in a devolved system of government, Kenya included, is not cast in stone and may be changed through either constitutional amendments or judicial interpretation of these functions.⁶²⁰ On changes through constitutional amendments, Chapter 16 provides for the procedure to be followed to effect such a change. Given that an amendment relating to the distribution of functions between the two levels of government touches on the structure of the devolved system of government as envisaged under Article 255(1)(i), such procedure must involve the introduction of a Bill in either house of Parliament and its passing in both houses. After presidential assent, the Bill must be put before a national referendum in which a simple majority is required to make the Bill law. As for changes through judicial interpretation, the courts under Chapter 10 are given a constitutional role to make decisions on issues touching on the Constitution including its interpretation. Such judicial decisions can have transformational impacts on the nature and operation of Kenya's devolved system of government.

Structure and composition of the county assemblies

As already stated above, the county assembly consists of members elected by the registered voters of wards, each ward constituting a single member constituency.⁶²¹ In addition, it has the number of special seat members necessary to ensure that not more than two-thirds of the membership of the assembly is of the same gender.⁶²² For purposes of equitable representation, the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament are considered and allotted seats.⁶²³ Just like the national Legislature, the county assembly has a

620 JM Kangu 'Constitutionalism: A comparative analysis of Kenya and South Africa' (2008) 2/1 *Moi University Law Journal* 105.

621 Article 177(1)(a).

622 Article 177(1)(b).

623 Article 177(1)(c).

speaker, who is an *ex officio* member, and who chairs the proceedings of the assembly.⁶²⁴

Qualifications for election as member of county assembly

For one to qualify to be elected as a member of a county assembly, (s)he has to satisfy certain educational, moral or ethical requirements prescribed by both the Constitution and Elections Act. Article 193(1) of the Constitution broadly enumerates these qualifications to include: Registration as a voter; satisfaction of any educational, moral and ethical requirements prescribed by the Constitution or an Act of Parliament; and either nomination by a political party, or independent candidature supported by at least five hundred registered voters in one's respective ward. As already stated elsewhere above, the Elections Act goes further to require that one may be nominated as a candidate for an election only if (s)he holds a certificate, diploma or other post secondary school qualification acquired after a period of at least three months study, and recognised by the relevant Ministry.⁶²⁵

On the other hand, both the Constitution⁶²⁶ and the Elections Act⁶²⁷ provide that one is disqualified from being elected a member of a county assembly if (s)he (a) is a State officer or other public officer, other than a member of the county assembly; (b) has, at any time within the five years immediately before the date of election, held office as a member of the IEBC; (c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election; (d) is of unsound mind; (e) is an undischarged bankrupt; (f) is serving a sentence of imprisonment of at least six months; or (g) has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened Chapter Six of the Constitution. Additionally, section 26 of the Elections Act disqualifies any person who directly or indirectly participates in any fundraising or harambee within eight months preceding a

624 Article 177(1)(d).

625 Section 22(1)(b), the Elections Act. See also Statute Law (Miscellaneous Amendments) Act, 2012.

626 Article 193(2).

627 Section 25(2), the Elections Act.

general election or during an election period. However, this rule is not applicable to a candidate who fundraises for his campaign or for his or her political party.⁶²⁸

Vacation of office of member of county assembly

The Constitution provides for circumstances in which a member of a county assembly may vacate his or her seat.⁶²⁹ This may occur when one dies or is absent for eight sittings of the Assembly without permission, in writing, of the Speaker, and is unable to offer satisfactory explanation for the absence. A member may also be removed from office upon failing to meet the qualifications of integrity and leadership enshrined under Chapter Six of the Constitution.

Furthermore, the seat may become vacant if the member resigns in writing addressed to the Speaker. Again, a member may vacate the Assembly if, having been elected as a member of a political party, resigns from the party, or is deemed to have resigned from the party. If a member was elected as an independent candidate, but subsequently joins a political party before the end of the term of the Assembly, he or she loses his seat as a member of the county assembly.

Conflict of laws

The Constitution provides that, in case of conflict of laws between national and county legislation in respect of matters falling within the concurrent jurisdiction of both levels of government, national legislation shall prevail if – the national legislation applies uniformly throughout Kenya; the national legislation is aimed at preventing unreasonable action by a county that is prejudicial to the economic, health or security interests of Kenya or another county; or impedes the implementation of national economic policy.⁶³⁰

On the other hand, county legislation shall prevail over national legislation if neither of the circumstances contemplated above

628 Section 26(2), the Elections Act.

629 Article 194(1).

630 Article 191(2).

apply. When called upon to consider an apparent conflict between legislation of different levels of Government, the Constitution obliges courts of law to prefer a reasonable interpretation of the legislation that avoids a conflict to an alternative interpretation that results in conflict.⁶³¹ It is important to note that a decision by a court to the effect that a provision of legislation of one level of Government prevails over another does not necessarily invalidate the other provision. Rather, it renders the provision inoperative to the extent of the inconsistency.⁶³²

631 Article 191(5).

632 Article 191(6).

CHAPTER 12

THE JUDICIARY

JUDICIAL AUTHORITY

Judicial authority refers to the power vested on a tribunal to decide authoritatively and conclusively disputes between subjects of the State, or between the State and its subjects.⁶³³ In exercising such authority, the tribunal is expected to make pronouncements, including awarding remedies to the aggrieved party. In Kenya the main institution empowered to provide remedies and sanctions for a breach of the Constitution or ordinary law is the Judiciary. The Judiciary is the arm of government vested with the power and responsibility to adjudicate on controversies between individuals or between individuals and the State.⁶³⁴

The 2010 Constitution is categorical that ‘judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals’ established under the Constitution.⁶³⁵ In exercising this authority, courts and tribunals are guided by five key principles. Firstly, the need to do justice to all irrespective of status; secondly, prompt dispensation of justice; thirdly, promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms; fourthly, the imperative to administer justice without undue regard to procedural technicalities; and, finally, the promotion and protection of the purposes and principles of the Constitution.⁶³⁶ Although traditional dispute resolution mechanisms are recognized, the 2010 Constitution has cushioned their potential abuse by expressly providing that they shall not be used in a way that contravenes the Bill of Rights, or is repugnant to justice and morality or is inconsistent with the Constitution or any written law.⁶³⁷

633 Currie & De Waal (n 500 above) 268.

634 As above.

635 Article 159.

636 Article 159(2).

637 Article 159(3)(a)–(c).

JUDICIARY: A HISTORICAL BACKGROUND

The emergence and evolution of the Judiciary can be traced to the East African Order in Council of 1897.⁶³⁸ Under this system, the Judiciary was not only based on a tripartite division of subordinate courts into Native courts, Muslim courts and those staffed by administrative officers and Magistrates, but also established a dual system of superior courts – one for Europeans and the other for Africans.⁶³⁹ Notwithstanding this formal structure, it is believed that the need to have a network of dispute resolution mechanisms throughout the country prompted the colonial administration to empower village elders, headmen and chiefs to settle disputes within their vicinity. These traditional dispute resolution mechanisms gradually evolved into tribunals and were therefore accorded official recognition in 1907, upon the promulgation of the Native Courts Ordinance.⁶⁴⁰

It is noteworthy that prior to Kenya being declared Britain's protectorate, during the reign of the Imperial British East African Company (IBEAC), administration of justice was haphazard.⁶⁴¹ This indeed impaired the development of the country's judicial system.⁶⁴² During this period, administration of justice was neither a consistent nor continuous, as the IBEAC handled different regions of the country differently. For example, coastal Kenya had Islamic courts administering justice, while a totally different system was applied in other parts of the country.⁶⁴³

The 1907 Native Courts Ordinance therefore sought to reorganise the country's justice system by authorising the Chief Native Commissioner to set up, control and administer the existing tribunals.⁶⁴⁴ Consequently, tribunals were established at the

638 See the Judiciary of Kenya website at http://www.judiciary.go.ke/judiciary/index.php?option=com_content&view=article&id=261&Itemid=295. Accessed, June 2012.

639 As above.

640 As above.

641 J Gitau 'Kenya's constitutional reform: The Kadhi's court debate' (2010) *Judiciary Watch Report* 180.

642 YP Ghai & JP McAuslan (n 78 above) 125.

643 Gitau (n 641 above).

644 See the Judiciary of Kenya website (n 638 above).

divisional level of each district and a *Liwali* was appointed at the Coast to adjudicate disputes arising in the Muslim community. This essentially meant that one could appeal against the decisions of these tribunals to the District Officer (DO), District Commissioner (DC) and finally to the Provincial Commissioner (PC). The Supreme Court was the highest court of appeal in the land.⁶⁴⁵

In 1930, the Native Appeals Tribunal's Ordinance was promulgated. This legislation, among other things, limited the number of elders sitting on a tribunal. It also made it a prerequisite for the person recording the tribunal's proceedings to be literate.⁶⁴⁶ The progress registered by these tribunals was very significant, leading to their replacement with courts similar to those that served non-Africans. In 1950, the colonial administration therefore enacted the African Courts Ordinance, which abolished the tribunals.⁶⁴⁷ This period also marked the beginning of restructuring of the country's court system. The CJ headed the new system, while the Registrar of the Supreme Court carried out the administrative duties.⁶⁴⁸ Experienced judges and magistrates were also appointed to administer justice in these courts. On the other hand, a Chief Kadhi headed Muslim courts, which were classified as subordinate courts. In spite of this restructuring, however, the African courts remained part of the provincial administration and not the judiciary. This was perhaps motivated by ethnic and racial considerations, perpetuated by the colonial policies of segregation. It was not until 1962 when these courts were eventually transferred to the judiciary.

When Kenya attained her independence in 1963, the Judiciary was further reoriented to accommodate the socio-political changes the country was experiencing. In the main, there was the pressing need to balance the racial composition in key governmental institutions. In the case of the Judiciary, this necessitated the establishment of an independent JSC that would ensure unbiased appointments of judicial officers. These developments also saw the establishment of the Court of Appeal, and in 1964, the renaming of the Supreme

645 As above.

646 As above.

647 As above.

648 As above.

Court as the High Court. To aid the process of reorientation and restructuring of the Judiciary, several legislations were enacted in the early years of the country's independence. For instance, in 1967, the Judicature Act, Magistrates' Courts Act⁶⁴⁹ and the Kadhis Courts Act were enacted.

It is noteworthy that immediately after independence, Kenya's Judiciary was hindered by various factors from performing its functions. Since the early 1960's, the Judiciary has been faced with the difficult task of maintaining the intricate balance between political transformation and just interpretation of the law. When called upon to determine matters of a political nature, it was in most occasions seen to be inclining towards the Executive to the detriment of other litigants or the public. Undoubtedly, therefore, the Judiciary earned an unfortunate reputation as the Government's handmaiden for undemocratic tendencies such as ethnic polarisation, electoral malpractices and uneven access to public resources. Judicial independence was largely a byword because the legal system was plagued with a number of handicaps including: inadequate legislative and institutional frameworks for appointment of competent judicial officers; the apparent appointment of judicial officers on the basis of tribalism, cronyism and personal loyalties; allegations of corruption and related malpractices; and political interference.

Grand corruption was for the umpteenth time the hallmark of the country's justice system.⁶⁵⁰ Among the host of corrupt activities reported include judges ruling in favour of litigants without regard to merit, misinformed litigants missing their court appearances, and lack of court reporting leading to decisions that ignore precedents.⁶⁵¹ This state of affairs would have gone unattended had it not been for the intervention of Government in 2003, which set up a committee to review the integrity of the Judiciary. In a report presented to CJ, Evans Gicheru, the committee alleged that a total of 105 judicial officers, including 87 magistrates and 23 judges, acted corruptly.⁶⁵²

649 Chapter 10, Laws of Kenya.

650 See 'Rehabilitating Kenya's judicial system' available at http://www.idrc.ca/en/ev-104828-201-1-DO_TOPIC.html (accessed on 21 July 2010).

651 As above.

652 As above.

Judges implicated in the report were given the option of either resigning or being investigated by tribunals.⁶⁵³ The refusal of five judges to resign prompted the President to set up two tribunals to investigate the corruption allegations.⁶⁵⁴

For slightly more than four decades, Kenya prided itself in a Constitution and a legal system aped from its former British coloniser. The repealed Constitution granted judges untrammelled security of tenure, meaning they could only be removed from office upon proof of inability to dispense their functions, or for misbehaviour, or upon attaining the age of 74 years.⁶⁵⁵ Where there was need to remove a judge from office, the President could appoint a tribunal to investigate the judge's conduct and suspend the judge from exercising the functions of his/her office pending the decision of the tribunal.⁶⁵⁶ Although security of tenure is ideally meant to strengthen the independence of judicial officers, using it as a shield, judicial officers successfully evaded accountability measures, leading to corruption, incompetence and indolence.

The repealed Constitution did not adequately guarantee judicial independence in so far as it vested upon the President enormous powers and overwhelming influence over the executive, judicial and legislative functions of government. For instance, it mandated the President to appoint the AG,⁶⁵⁷ CJ and other judges.⁶⁵⁸ As already mentioned above, the question of determining the removal of these judicial officers was also vested on the President who by law was required to appoint a tribunal in this regard. As correctly pointed out in the African Peer Review Mechanism (APRM) report on Kenya:

The subordination of Parliament to the Executive in law making and parliamentary oversight functions, the failure of the executive to heed parliamentary recommendations, executive interference in appointments to the Judiciary, [did] not conform to the accepted

653 As above.

654 As above.

655 As above, section 62(1) & (2).

656 As above, section 62(4).

657 As above, section 109.

658 As above, section 61.

norms of democracy and [were] a source of disquiet in certain segments of Kenyan society. The traditional democratic notion of checks and balances is seen as a safety net that can best ensure that government organs work in a perfect equilibrium to deliver to the citizen an acceptable governance package.⁶⁵⁹

Democracy, strictly so-called, was therefore not tenable in Kenya, mostly due to an 'authoritarian Constitution' that vested enormous powers in the presidency. Disquiet with the overly amended repealed Constitution, coupled with detest for the abuse of executive powers by incumbents, led to the agitation for constitutional reforms. It was strongly believed that only comprehensive constitutional reforms could ensure separation of powers and bring to an end the abuse of executive powers.

Although the agitation for constitutional reforms begun in the early 1990s, initial attempts at comprehensive reforms were given legal effect in 1998, when the Constitution of Kenya Review Act was enacted.⁶⁶⁰ These attempts, however, were not immediately fruitful because the then KANU Government was not comfortable with the scope of the potential reforms. Most contentious were proposals on the devolution of powers through a federal system of government and the limiting of the powers of the President through the creation of the office of a Prime Minister with 'executive powers'.⁶⁶¹

The wrangling between the Government and opposition parties saw the country go into the 2002 elections without effecting substantial legislative reforms. Principally, the constitutional review process was hampered by divisive politics, animated by high levels of political posturing and discord. More often than not, national interests were traded off against the sectarian interests of politicians

659 See African Peer Review Mechanism 'Country Review Report of the Republic of Kenya' http://www.polity.org.za/article.php?a_id=99422 (accessed 4 February 2010) 50.

660 See the Constitution of Kenya Review Act No. 13 of 1997. According to Section 2A (c) of the Act, the purpose the Constitution review process was to secure provisions in the Constitution 'recognising and demarcating divisions of responsibility among the State organs of the executive, the legislature, and the judiciary so as to create checks and balances between them and ensure accountability of the government and its officers to the people of Kenya.'

661 See Kituo Cha Katiba 'Key historical and constitutional developments' available at <http://www.kituoachakatiba.co.ug/constkenya.htm> (accessed 1 September 2010).

and other decision-makers. Without constitutional reform, there was no judicial reform, and consequently, in the event of a political dispute, such as the one that occurred in the post-2007 elections period, the Judiciary, perceived as fundamentally inadequate, could not be relied on to effectively mediate on ensuing conflicts.

When Kenya was engulfed in post election anarchy in 2007 following the declaration of President Kibaki's disputed victory, the international community, rather than the country's Judiciary, was found to be a more suitable mediator. This was primarily because, behind the façade of alleged election fraud, were decades-old tensions, including the perceived lack of accountability and transparency in the three arms of government, that instigated the national pandemonium.⁶⁶² Moreover, the country's judiciary has recurrently been criticized for continuing to identify with questionable judicial pronouncements that border on partisanship. Thus, the endemic failures in governance, coupled with Executive interference with the Judiciary, have since independence undermined the role the judicial arm would potentially have played in redressing the electoral dispute. It was therefore imperative for necessary legislative and institutional reforms to be instituted to guarantee the evolution of a judicial system that would be sensitive to the country's socio-political transformation.

After the 2007 post-elections violence, it was obvious that the country was in desperate need of a 'watertight' judicial system that would ensure greater citizens' participation and promote accountability and transparency in the conduct of public affairs. Characteristically, such a judicial system should provide equal opportunities to all litigants without regard to status, age, gender, ethnicity, race or political affiliation. Secondly, it should be an empowered judiciary that would determine, without undue interference, the question of transfer of political power and periodic renewal of political leadership. Thirdly, without compromising its cherished independence, the Judiciary should have a good working relationship with other state organs, such as the Legislature, the Executive, the national human rights institutions, as well as non-

662 Human Rights Watch 'Ballot to bullet: Organised political violence and Kenya's crisis of governance' (2008) 20/1 (A) 3.

governmental entities. Lastly, it should adhere to the rule of law in a manner that would protect human rights and democracy and ensure equal access to justice for all.

With these characteristics in mind, the search for a new judiciary begun in earnest as the parameters thereof was clearly set. Indeed, the promulgation of a new Constitution on 27 August 2010 strongly signaled the beginning of a new era for the Judiciary as well as other institutions in the country. This is because the new Constitution incorporates some of the above-mentioned characteristics in a number of ways. For example, it categorically states that the Judiciary shall be subject only to the Constitution and the law and not the control or direction of any person or authority.⁶⁶³ The 2010 Constitution has also improved on the provisions relating to the criteria for appointment of judges,⁶⁶⁴ their tenure,⁶⁶⁵ as well as their removal from office.⁶⁶⁶

In order to ensure a complete transformation of the Judiciary, Schedule Six of the new Constitution provides for the establishment of mechanisms and procedures for vetting the suitability of all judges and magistrates who were in office under the old dispensation.⁶⁶⁷

Subsequently, Parliament passed the Vetting of Judges and Magistrates Act, 2011.⁶⁶⁸ Part II of the Act provides for the establishment, composition, functions and powers of the Vetting of Judges and Magistrates Board which body is charged with determining the suitability of judges⁶⁶⁹ as the JSC vets magistrates. The Board delivered its initial judgement that saw four Court of Appeal judges relieved from office.⁶⁷⁰ These judges include Riaga

663 Article 160(1).

664 Article 166(2).

665 Article 167.

666 Article 168.

667 Schedule Six; article 23(1). See also article 24(1) which required the Chief Justice to vacate office within sixth months from the effective date of the Constitution to pave way for the appointment of a new Chief Justice.

668 Act number 2 of 2011.

669 Section 23(2).

670 Section 23(3). A subsequent amendment to the Act enjoined the JSC into the vetting exercise.

Omollo, Samuel Bosire, Emmanuel Okubasu and Joseph Nyamu.⁶⁷¹ Generally, the vetting process is intended to ensure that all judicial officers measure up to the functions they have been employed to perform.

These developments are indicative of the fact that judicial transformation in Kenya is in the offing. Hopefully, Kenya will sooner or later have a vibrant Judiciary that will ably determine the socio-political transformation of the nation in unprecedented ways. This, however, will be possible only if the Judiciary is bold enough to sever its traditional and unhealthy bond with the Executive. The mere promulgation of a robust Constitution does not necessarily guarantee judicial independence. What really matters is the total attitude, value system, nature and composition of the bench that will subsequently be appointed to preside in the courts under the new constitutional order.

STRUCTURE AND JURISDICTION OF THE COURTS

The 2010 Constitution acknowledges two tiers of courts: Superior and subordinate courts. Superior courts comprise the Supreme Court, Court of Appeal, High Court and other courts with the status of the High Court with competence to hear and determine disputes relating to employment and labour relations and the environment and land.⁶⁷² Subordinate courts include the Magistrates courts, Kadhis courts, Courts Martial and any other court or local tribunal as may be established by an Act of Parliament.⁶⁷³

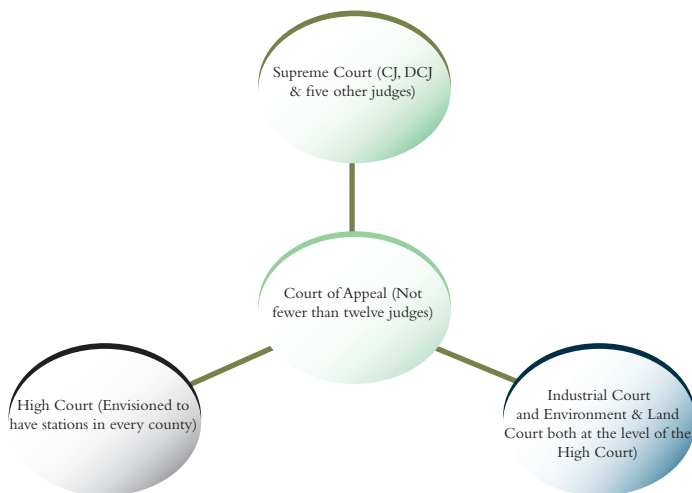
SUPERIOR COURTS

As is the practice in the common law, superior courts under the new dispensation correspond to a hierarchical scheme that places the Supreme Court at the apex and the High Court and the two specialised courts at the basement. The following figure illustrates the new structure of superior courts.

⁶⁷¹ See T Maliti 'Four Kenyan Appeal Court Judges declared unfit for office' available at <http://www.icckkenya.org/2012/04/four-kenyan-appeals-court-judges-declared-unfit-for-office/> last accessed on 15 May 2012.

⁶⁷² Article 162(1) & (2), 2010.

⁶⁷³ Article 162(4).



THE SUPREME COURT

At the pinnacle of the judicial structure established by the 2010 Constitution rests the Supreme Court. This foremost judicial tribunal consists of the CJ (who is the president of the court), the DCJ (who is the vice-president of the court) and five other judges.⁶⁷⁴ The mandate given the court may fall under the following rubrics; adjudicative, review, and advisory.

The adjudicative jurisdiction of the Court is both original and appellate. The original mandate is with respect to its exclusive jurisdiction to hear and determine disputes relating to the election of the President,⁶⁷⁵ and perhaps the check on the executive power to declare state of emergency.⁶⁷⁶ In the former sense, the Supreme Court is the ultimate electoral court for it is the only tribunal entrusted with adjudicating disputes arising out of the election of the highest ranking State official, the President. In the latter sense, the Court is relied upon as a fortress for human rights, public order and security whose sobriety and judgement may be called upon in cases of extreme emergency.

⁶⁷⁴ Article 163 (1)(a)-(c); article 140.

⁶⁷⁵ Article 163(3)(a).

⁶⁷⁶ Article 58(5).

As an appellate tribunal, the Supreme Court has power (ordinarily) to entertain two kinds of appeals: those that lie as of right in any case involving the interpretation or application of the Constitution; and in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved.⁶⁷⁷ These appeals may lie from the Court of Appeal and any other court or tribunal as prescribed by national legislation.⁶⁷⁸ The Supreme Court also has jurisdiction to entertain appeals relating to decisions of tribunals established to consider the suitability of judges of superior courts in accordance with article 168 of the 2010 Constitution. Appeal jurisdiction given to this Court signifies its status as the ultimate tribunal in the judicial system.

There is an additional special but transient jurisdiction vested in the Court by the Supreme Court Act.⁶⁷⁹ This regime deploys the Supreme Court in the ongoing transformation of the Judiciary by empowering it to review and sanitise decisions of judicial officers who leave the institution on grounds of misconduct or misbehaviour. It is envisaged that such officers would either be removed on account of recommendation by a tribunal appointed by the President; or pursuant to the sieving process provided for under the Vetting of Judges and Magistrates Act. Some judicial officers may equally opt to resign or retire in consequence of a complaint of misconduct or misbehaviour. To qualify for review however, the decisions candidates for correction must be the basis of the removal, resignation or retirement of, or complaint against, the judge. Clearly, the Supreme Court is highly regarded morally and in this respect is expected to steer the sanctification of an institution in which corruption and incompetence habitually thrived.

But it is the advisory jurisdiction of the Supreme Court that has been contested before the tribunal. The jurisdiction has already earned for itself a reputable place in the many weighty and controversial debates revolving around new constitutional provisions. It is probably for this reason that the Supreme Court seized occasion

⁶⁷⁷ Article 163(4).

⁶⁷⁸ Article 163(3)(b).

⁶⁷⁹ See Section 14, the Supreme Court Act.

in *Re the Matter of the Interim Independent Electoral Commission*⁶⁸⁰ to make a number of clarifications regarding its exercise. According to this counsel, only the national government, a State organ or a county government have capacity to invoke advisory jurisdiction.

Secondly, the Supreme Court hinted that it ‘will be hesitant to exercise its discretion to render an advisory opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court’. This means that the Court gives adversarial litigation precedence over advisory proceedings. However, this may not be the case where the adversarial litigation in question is instituted after a request has been made for an advisory opinion. The Supreme Court nonetheless retains the latitude to uphold the public interest in all instances. To justify advisory jurisdiction in the future an applicant may be required to demonstrate that the matters in issue would not be amenable to expeditious resolution through adversarial court process.

Thirdly, the Supreme Court directed that advisory jurisdiction, although discretionary, must not always be resorted to. The Court gave different reasons for the reluctance to engage advisory jurisdiction, the most prominent being that it is unwilling to be regularly used as a think-tank for State organs. Another reason supplied by the judges has to do with the belief that judicial tribunals operate at their optimal in cases where real matters are adjudicated in an adversarial manner hence giving judicial officers ample opportunity to consider both sides of an argument before entering verdicts. This school holds that frequent use of other approaches such as exercising the advisory mandate would only erode judicial authority as well as indulge the Court in academic speculations. The Supreme Court also sought to avoid future situations whereby real disputes may occur pertaining to a subject matter upon which advisory opinion has already been rendered.

Finally, the jurisdiction has been held to only apply to matters with respect to county governments. This means that a party who invites the Court to exercise this jurisdiction must demonstrate that the issues canvassed in the request relate to county governments. Although the Court interpreted matters County broadly enough

680 [2011] eKLR.

as to even include questions regarding the date of elections, which was the main subject of the application, it eventually limited the scope of its advisory jurisdiction. This interpretation is erroneous for the highest court failed to appreciate the totality of article 163(6) of the 2010 Constitution, which states the Supreme Court ‘may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government’. The proper approach would have been to give the stipulation its correct, complete and literal meaning. Going by this formula, the Supreme Court should have found that while the national government and any other State organ may seek advisory opinion on any constitutional matter, it is county governments that are limited to consulting the Court only on matters concerning county governance. Such a finding would have secured the entire jurisdiction envisioned for the Court by the Constitution as well as positioned the tribunal early on as an accurate interpreter of the law.

Being the highest judicial institution, the decisions of the Supreme Court are binding on all other courts other than itself.⁶⁸¹ This is the case even in situations where the Court gives advisory opinions.⁶⁸²

The Court of Appeal

The 2010 Constitution provides for the establishment of a Court of Appeal consisting of not fewer than twelve judges.⁶⁸³ The Court of Appeal, the second in hierarchy, is headed by the President elected by other judges of the Court.⁶⁸⁴ The jurisdiction of the Court extends to hearing of appeals mainly from the High Court and from other courts or tribunals as legislation may prescribe.⁶⁸⁵ The Court has traditionally been situated in Nairobi (though it holds periodic sessions in Mombasa, Kisumu, Nakuru, Nyeri and Eldoret)⁶⁸⁶ and

681 Article 163(7).

682 *Re the Matter of the Interim Independent Electoral Commission* [2011] eKLR.

683 Article 164(1)(a).

684 Article 164(2).

685 Article 164(3).

686 N 638 above.

there are efforts to permanently station the Court in a few more locations. Initially a tribunal with a lean establishment, the Court now has capacity of 30 judges.⁶⁸⁷

The High Court

The 2010 Constitution establishes a High Court⁶⁸⁸ headed by a Principal Judge elected by other judges of the Court.⁶⁸⁹ The High Court has perhaps the most elaborate mandate of all judicial institutions in the legal system. It, for instance, enjoys unlimited original jurisdiction in criminal and civil matters.⁶⁹⁰ It is also a constitutional court in at least four respects. Firstly, it has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.⁶⁹¹ This mandate firmly establishes the High Court as the real bastion for human rights. It is the court of human rights, in other words. Secondly, the High Court has power to hear an appeal from a decision of a tribunal appointed under the Constitution to consider the removal of a person from office, other than a tribunal appointed to investigate the suitability of a President under article 144 of the Constitution.⁶⁹² Finally, the Court has jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of – (i) the question whether any law is inconsistent with or in contravention of the Constitution; (ii) the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under article 191 of the Constitution.⁶⁹³

687 As above.

688 Article 165(1).

689 Article 165(2).

690 Article 165(3)(a).

691 Article 165(3)(b).

692 Article 165(3)(c).

693 Article 165(3).

Quite clearly, the High Court has been entrusted with the mandate to interpret the Constitution. This empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction; for, by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the Constitution, certainly in respect of matters resolved at first instance by the High Court.⁶⁹⁴

The High Court could also exercise any other jurisdiction, original or appellate, conferred on it by legislation.⁶⁹⁵

Further, the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.⁶⁹⁶ The Court, however, cannot exercise this jurisdiction over a superior court. In order to foster speedy dispensation of justice, the High Court (in some stations such as Nairobi) has been divided into several specialised divisions, namely, Family Division, Criminal Division, Civil Division, Commercial Division and Constitutional and Judicial Review Division. The Court has also been decentralised geographically on the basis of the county boundaries. Thus, the new establishment provides for about forty seven High Court stations⁶⁹⁷ up from fifteen.⁶⁹⁸

Environment and Land Court

The Environment and Land Court is one of the tribunals envisioned by article 162(2) of the 2010 Constitution as enjoying equal status with the High Court. Its elaborate grounding is however done by the Environment and Land Court Act.⁶⁹⁹ The Court consists of the Presiding Judge, elected in accordance with article 165(2) of the

694 N 682 above.

695 Article 165(3)(e).

696 Article 165(6).

697 N 638 above.

698 As above. These are in Nairobi, Milimani, Kisumu, Kisii, Bungoma, Kakamega, Nakuru, Eldoret, Kitale, Embu, Nyeri, Mombasa, Malindi, Meru, Machakos with sub registries in Kericho and Busia.

699 Section 4. This Act effectively repealed the Land Disputes Tribunal Act, number 18 of 1990 is repealed.

Constitution⁷⁰⁰ for a non-renewable term of five years,⁷⁰¹ and such number of judges as may be determined by the JSC.⁷⁰² The Presiding Judge has supervisory powers over the Court and reports to the CJ.⁷⁰³

The Environment and Land Court has jurisdiction to adjudicate over disputes both originally and on appeal, as well as review decisions of other tribunals in certain instances. Its material jurisdiction is however, limited to the subjects of environment and land and entails such matters as: environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; compulsory acquisition of land; and land administration and management; public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.⁷⁰⁴ The Court may also adjudicate disputes for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedoms relating to a clean and healthy environment under articles 42, 69 and 70 of the Constitution.⁷⁰⁵

While most of these disputes are likely to arise originally in the tribunal,⁷⁰⁶ it is to be expected that the Court could exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals⁷⁰⁷ such as the National Environmental Tribunal⁷⁰⁸ from which appeals formerly lay with the High Court.⁷⁰⁹ In this connection, the Court may call for the record of any proceedings

700 Section 6(1).

701 Section 6(2).

702 Section 5.

703 Section 6(3). In the absence of the Presiding Judge or in the event of a vacancy in the office of the Presiding Judge, the judges of the Court may elect any other Judge of the Court to exercise the functions of the Presiding Judge – section 6(4).

704 Section 13(2). Section 150 of the Land Act (Chapter 6 of 2012) gives the Environment and Land Act jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.

705 Section 13(3), Environment and Land Act.

706 Section 13(1), Environment and Land Act.

707 Section 13(4), Environment and Land Act.

708 Established by section 125 of the Environmental Management and Coordination Act, Chapter 8, 2003.

709 Section 130, Environmental Management and Coordination Act.

before any subordinate court, body, authority or local tribunal exercising judicial or quasi-judicial functions, or a decision of any person exercising executive authority, and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.⁷¹⁰ All these judicial services should be reasonable, equitable and accessible in all counties.⁷¹¹

In exercise of its jurisdiction under this Act, the Court is guided by the following principles – Sustainable development; public participation in the development of policies, plans and processes for the management of the environment and land; cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law; international co-operation in the management of environmental resources shared by two or more states; intergenerational and intragenerational equity; polluter-pays; pre-cautionary; land policy under developed under article 60(1) of the 2010 Constitution; judicial authority under article 159(2) of the Constitution; national values and principles of governance under article 10(2) of the Constitution; and the values and principles of public service under article 232(1) of the Constitution.⁷¹²

The architect of this Court reserves for alternative dispute resolution a pride of place.⁷¹³ Thus, it is within the Court's power to give these mechanisms a chance, especially where these are conditions precedent in the matter before the tribunal.

Industrial Court

Parliament has established an Industrial Court also in pursuance of article 162(2)(a) of the Constitution.⁷¹⁴ The Court, which enjoys the status of the High Court, consists of the Principal Judge and such number of judges as the President may, acting on the

710 Section 13(6), Environment and Land Court Act.

711 Section 26(1), Environment and Land Court Act.

712 Section 18, Environment and Land Court Act.

713 Section 20, Environment and Land Court Act.

714 Industrial Court Act, Act number 20, 2011.

recommendations of the JSC, appoint.⁷¹⁵ The Principal Judge (who is the head of the Court) is elected by other judges of the Court.⁷¹⁶ This foremost judge has supervisory powers and is answerable to the CJ.⁷¹⁷ Other officers of the Court include the Registrar, Senior Deputy Registrar, one or more Deputy Registrars and one or more Assistant Registrars as the administration of justice may require.⁷¹⁸

The material jurisdiction of the Industrial Court relates to determining disputes arising out of employment and labour relations.⁷¹⁹ Industrial Court judges are likely to arbitrate disputes involving employers, employees, employers' organisations, trade unions or their federations, the Cabinet Secretary charged with labour affairs and the Registrar of Trade Unions.⁷²⁰

The Court has both original and appellate jurisdiction with respect to employment disputes. It also has a review mandate entailing capacity to revise its own judgements, awards, orders or decrees.⁷²¹ In the spirit of the 2010 Constitution,⁷²² the Industrial Court Act provides ample room for alternative dispute resolution, including internal methods, through conciliation, mediation and traditional dispute resolution mechanisms⁷²³ to the extent that the Court may refuse to determine any original dispute if it is satisfied that there has been no attempt at alternative dispute resolution.⁷²⁴

Appointment and removal of judges

The CJ and the DCJ are appointed by the President in accordance with the recommendation of the JSC and subject to the approval of the National Assembly.⁷²⁵ A similar process applies with respect

715 Section 5, Industrial Court Act.

716 Section 5(2), Industrial Court Act.

717 Section 5(4), Industrial Court Act.

718 Section 9(1), Industrial Court Act.

719 Article 162(2), 2010 Constitution.

720 Section 12(1) & (2), Industrial Court Act.

721 Section 16, Industrial Court Act.

722 See article 159(2)(c).

723 Section 15(1), Industrial Court Act.

724 Section 15(2), Industrial Court Act.

725 Article 166(1)(a).

to other judges except that that in their case, the approval of the National Assembly is not necessary.⁷²⁶

The CJ, the DCJ and other judges of the Supreme Court are appointed from among persons who have at least fifteen years of experience, either as judges of superior courts, or as distinguished academics, judicial officers, legal practitioners or have such experience in other relevant legal fields.⁷²⁷ The same qualifications apply to judges of the Court of Appeal, the High Court and judges of the Industrial Court and the Land and Environment Courts except that these courts require persons with lesser experience of at least ten years. Judges of the Industrial Court are expected to have more specialised in the law and practice of employment and labour relations⁷²⁸ just as the Environment and Land Court calls for expertise in the law of real property and environment.⁷²⁹ In addition, a person qualifies for appointment as judge if s/he holds a recognised degree in law⁷³⁰ and has a high moral character, integrity and impartiality.⁷³¹

A judge may vacate office by reason of retirement, death, resignation or removal.⁷³² Although the mandatory retirement age for a judge is seventy years, one may elect to retire at any time after attaining the age of sixty-five years.⁷³³ In the case of the office of CJ, one has a choice either to hold office for a maximum period of ten years or until retirement, whichever is earlier.⁷³⁴ If the CJ's term of office expires before the mandatory retirement age for a judge, (s)he may continue in office as a judge of the Supreme Court.⁷³⁵ This eventuality may necessitate eight rather than seven judges in

726 Article 166(1)(b).

727 Article 166(3).

728 Section 6(b), Industrial Court Act.

729 Section 7(1)(b).

730 Article 166(2)(a).

731 Article 166(2)(c). The Environment and Land Court Act specifically provides that judges must meet the requirements of Chapter Six of the Constitution – section 7(1)(d).

732 See Articles 167 & 168.

733 Article 167(1).

734 Article 167(2).

735 Article 167(3).

the Supreme Court. Resignation from judicial office is executed by giving notice in writing to the President.⁷³⁶ Notwithstanding the fact that judges of superior courts enjoy a secure tenure, they may be removed from office on grounds of inability to perform their functions due to mental or physical incapacity; breach of a code of conduct prescribed for judges by an Act of Parliament; bankruptcy; incompetence; or gross misconduct or misbehaviour.⁷³⁷ The removal of a judge may be initiated only by the JSC acting on its own motion, or on the petition of any person.⁷³⁸ Already, this process has been invoked in the case of the first DCJ, Nancy Baraza. In this case, a private security guard by the name of Rebecca Kerubo alleged that Baraza pinched her nose at the Village Market mall. The guard alleged that she stopped the judge with the intention of inspecting her, like every other person who visited the mall. However, the judge refused to be inspected, after which an altercation ensued. The judge then allegedly pinched Kerubo's nose, walked to her car and came back into the mall brandishing a gun, threatening to shoot the guard. The JSC and the police separately investigated the matter, with the former recommending the suspension of the judge and the formation of a tribunal to investigate the alleged misconduct, and the later advising the DPP to prosecute her. These circumstances warranted the President to suspend Baraza and subsequently form a tribunal to investigate the allegations against her.

SUBORDINATE COURTS

There exist a number of subordinate courts including Magistrate courts, Kadhi courts, the Court Martial and other courts or local tribunals established by Parliament.⁷³⁹

Magistrate Courts

The 2010 Constitution provides for the establishment of Magistrate Courts.⁷⁴⁰ The elaborate jurisdiction and competence of these courts

736 Article 167(5).

737 Article 168(1).

738 Article 168(2).

739 Article 169(1).

740 As above.

is prescribed in the Magistrates Courts Act. Magistrate Courts are at two levels: Resident Magistrates' Courts and District Magistrates' Courts.

A Resident Magistrate's Court is duly constituted when held by a Chief Magistrate, a Senior Principal, a Principal Magistrate, a Senior Resident Magistrate or a Resident Magistrate.⁷⁴¹ Resident Magistrate's Courts have jurisdiction throughout the Republic⁷⁴² and handle civil and criminal matters depending on the rank of the magistrate. In descending order, the hierarchy of Magistrates is as follows: Chief Magistrate; Senior Principal Magistrate; Principal Magistrate; Senior Resident Magistrate; Resident Magistrate; and District Magistrate.

The civil jurisdiction of a Resident Magistrate's Court depends largely on the value of the subject matter in issue and the rank of the magistrate sitting. According to the latest amendments,

Magistrate Courts shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed:

- (a) Seven million shillings for a Chief Magistrate;
- (b) Five million shillings for a Senior Principal Magistrate;
- (c) Four million shillings for a Principal Magistrate;
- (d) Three million shillings for a Senior Resident Magistrate; and
- (e) Two million shillings for a Resident Magistrate.⁷⁴³

The resident magistrate's court also has the same jurisdiction and powers in proceedings concerning claims under customary law as is conferred on district magistrates.⁷⁴⁴

Resident magistrate's courts have jurisdiction in criminal cases although the offences, sentences or fines the courts may impose are limited, again, depending on the class of the court and the rank of the magistrate sitting. For instance, a subordinate court of the first class

741 Section 3(1), Magistrates' Courts Act.

742 Section 3(2), Magistrates' Courts Act.

743 Section 5, Magistrates' Courts Act. See, Statute Law (Miscellaneous Amendments) Act, 2012.

744 Section 5(2), Magistrates' Courts Act.

held by a Chief Magistrate, Senior Principal Magistrate, Principal Magistrate or Senior Resident Magistrate may pass any sentence authorized by law for any offence triable by the court;⁷⁴⁵ while a first class resident magistrate may pass any sentence authorized by law for an offence under section 278, 308(1) or 322 of the Penal Code or under the Sexual Offence Act.⁷⁴⁶ Subject to the foregoing, a subordinate court of the first class may pass sentences, in cases where they are authorized by law, of imprisonment for a term not exceeding seven years; and a fine not exceeding twenty thousand shillings.⁷⁴⁷ Similarly, a subordinate court of the second class may pass sentences, in cases where they are authorized by law, of imprisonment for a term not exceeding two years; or a fine not exceeding ten thousand shillings.⁷⁴⁸ Capital offences such as murder or treason that attract the death penalty are beyond the jurisdiction of magistrates.

There is established for each district a district magistrate's court that is duly constituted when held by a district magistrate, assigned to a district by the JSC.⁷⁴⁹ The CJ may, however, by order, designate any two or more districts as joint district, and thereupon those districts shall be deemed to be one district for purposes of the court's jurisdiction.⁷⁵⁰ A district magistrate's court shall have jurisdiction throughout the district in respect of which it is established provided that the CJ may, by notice in the Gazette, extend the area of jurisdiction of the Court.⁷⁵¹ A district magistrate has power to hold a magistrate's court of such class as is designated by the JSC.⁷⁵²

The civil jurisdiction of a district magistrate's court extends to proceedings concerning a claim under customary law;⁷⁵³ or matters whose value do not exceed five thousand shillings, or ten thousand shillings where the court is constituted by a district magistrate

745 Section 7(1), Criminal Procedure Code, Chapter 75, Laws of Kenya.

746 Section 7(1), Criminal Procedure Code.

747 Section 7(2), Criminal Procedure Code.

748 Section 7(3), Criminal Procedure Code.

749 Section 7(1).

750 Section 7(2).

751 Section 7(3), Magistrates' Courts Act.

752 Section 6.

753 Section 9(a).

having power to hold a magistrate's court of the first class.⁷⁵⁴ Any person who is aggrieved by an order of a magistrate's court of the third class made in proceedings of a civil nature may appeal against the order to a magistrate's court of the first class.⁷⁵⁵

District magistrates similarly have criminal jurisdiction, although the kinds of offences, fines and penalties allowed the courts are far much less.⁷⁵⁶ Where a person who is convicted of an offence on a trial held by a magistrate's court of the third class, or where a person charged with an offence has been acquitted on such a trial, the AG may appeal against his/her conviction or sentence, or both, or against the acquittal, as the case may be, to the resident magistrate's court: Provided that no appeal shall lie in the case of a person who pleaded guilty and was convicted on that plea, except as to the legality or extent of the sentence.⁷⁵⁷

Kadhi Courts

The 2010 Constitution provides for the establishment of Kadhis Courts headed by a Chief Kadhi and at least three other Kadhis.⁷⁵⁸ The jurisdiction of these religious tribunals is limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the courts.⁷⁵⁹ Besides the Constitution, the operation of these courts is regulated under the Kadhi's Courts Act.⁷⁶⁰ The CJ in consultation with the Chief Kadhi determines the number of Kadhi's Courts, under this law.⁷⁶¹

754 Section 9(b).

755 Section 11(1).

756 See section 10, Magistrates' Courts Act.

757 See section 10, Magistrates' Courts Act.

758 Article 170(1), 2010 Constitution. Also, section 3, Kadhi's Courts Act.

759 Section 5A, Kadhi's Courts Act.

760 Chapter 11, Laws of Kenya.

761 Section 3, Kadhi's Courts Act.

Court Martial

The 2010 Constitution leaves room for the operation of Court Martials, which are tribunals established to try military personnel who commit the offences provided for under the Armed Forces Act.⁷⁶² A Court Martial is usually convened by the Chief of General Staff, by the Commander or by an officer not below the rank of major or corresponding rank authorised by the Chief of General Staff.⁷⁶³ Ordinarily, a Court Martial consists a Presiding Officer and not less than two other members.⁷⁶⁴ However, the tribunal will normally sit the Presiding Officer and not less than four other members where an officer is to be tried or where the only punishment or the maximum punishment that can be awarded in respect of the charge before the court is death.⁷⁶⁵

The Presiding Officer of a court martial shall be a person who is an officer not below the rank of major or corresponding rank. However, if the convening officer is of opinion that such an officer having suitable qualities is not available having regard to the exigencies of the service, and records his opinion in a written statement, the presiding officer may be an officer not below the rank of captain or corresponding rank⁷⁶⁶ who has been an officer for a period of not less than five years or for periods amounting in the aggregate to not less than five years. The other members of the Court Martial are drawn from persons who have been officers for a period of not less than two years or for periods amounting in the aggregate to not less than two years.⁷⁶⁷ At least two of the members have to be of or above the rank of captain or corresponding rank.⁷⁶⁸ A Court Martial may sit at any place within or outside Kenya as

762 Chapter 199, Laws of Kenya. Chapter V of the Act provides for a number of offences, which are triable before the Court Martials.

763 Section 85(2), Armed Forces Act.

764 Section 86(1).

765 Section 86(1).

766 Section 86(2)(a).

767 Section 86(3).

768 Section 86(3).

directed by the convening officer or at such place as the court itself may consider appropriate.⁷⁶⁹

Except with the written consent of the AG, there shall be a judge advocate at each court martial who shall be a magistrate or an advocate appointed by the CJ.⁷⁷⁰ Appeals from the Court Martial may be lodged with the High Court whose finding(s) is final.⁷⁷¹

Other specialised courts and tribunals

Under the subordinate courts' sub cluster are Specialised Courts, such as the Children's Courts⁷⁷² and Anti-Corruption Courts.⁷⁷³ While the former deals with matters relating to children, the latter deals with matters relating to corruption and integrity.⁷⁷⁴ These courts are located across the country and are presided over by Magistrates duly appointed by the CJ.

In addition to Specialised Courts, the law permits the establishment of tribunals to deal with disputes arising in the course of the regulation and administration of certain matters. Most notable tribunals in the history of Kenya's legal system are the Industrial Court established to deal with labour disputes; Land Disputes Tribunals which deals with disputes relating to land; Rent Restriction Tribunal which attends to disputes between landlord and tenants of residential houses; and the Business Premises Tribunal which determines cases involving landlords and tenants of business premises such as shops and hotels.⁷⁷⁵ The difference between the tribunals and other courts is that the latter's jurisdiction is confined to the determination of very specific matters. Otherwise, litigants who appear before a tribunal are entitled to same rights and standards of service as those in the ordinary courts.⁷⁷⁶

769 Section 88.

770 Section 89.

771 Section 115(3).

772 See, section 73, Children Act.

773 See, Part II of the Anti Corruption and Economic Crimes Act, Chapter 65.

774 See N 638 above.

775 As above.

776 As above.

THE JUDICIAL SERVICE COMMISSION

The JSC is the body bestowed with the responsibility of promoting and facilitating ‘the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice.’⁷⁷⁷ Among its many tasks the JSC is expected to:⁷⁷⁸

- Recommend to the President persons for appointment as judges;
- Review and make recommendations on the conditions of service of:
 - (i) judges and judicial officers, other than their remuneration; and
 - (ii) the staff of the Judiciary;
- Appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;
- Prepare and implement programmes for the continuing education and training of judges and judicial officers; and
- Advise the national government on improving the efficiency of the administration of justice.

Arguably, the establishment of the JSC was intended to be the optimum solution in ensuring a fair and transparent process of appointing judicial officials, whilst safeguarding against excessive ‘tribalisation’ and politicisation of the Judiciary. Under the repealed Constitution, the JSC was not an independent body. Rather, it was composed of five members who were considered ‘insiders’ for they all owed their positions directly to the President. These included; the CJ (chairperson), the AG, a Judge of the Court of Appeal, a Judge of the High Court, and chairperson of the PSC.⁷⁷⁹ Because of the skewed composition, judicial appointments were widely criticised as a form of patronage and a source of influence that was used to serve short-term political interests.

⁷⁷⁷ See Article 172(1), 2010 Constitution.

⁷⁷⁸ Article 172(1)(a)–(e), 2010 Constitution.

⁷⁷⁹ See the Constitution of Kenya, 1963 (as amended).

Under the new constitutional dispensation, however, the JSC is more representative in composition and less susceptible to Executive and political interference. Each cadre of the courts is entitled to elect one representative to the JSC. This translates into a Court of Appeal Judge elected by the Judges of Appeal, a High Court Judge elected by Judges of the High Court and a Magistrate elected by magistrates. The Law Society of Kenya (LSK),⁷⁸⁰ being the statutory organisation representing the legal profession is, for the first time, entitled to elect two representatives, a man and a woman, while one person nominated by the President represents the PSC. The general public has also not been left out as it has two representatives in the Commission, appointed by the President. The AG, as the chief legal advisor of the State, is also a member of the Commission. The CJ chairs the JSC while the Chief Registrar of the Judiciary serves as its Secretary.

The current set-up of the JSC is expected to enhance the position of the Judiciary as an independent arm of Government and at the same time create a stronger guarantee of scrutiny of possible candidates for judicial office. It also guarantees greater public protection against political or capricious appointments. Above all, it is consistent with international best practices and standards.

780 Established by the Law Society of Kenya Act.

CHAPTER 13

THE BILL OF RIGHTS

INTRODUCTION AND CONTEXT

One dominant view holds that human rights are those entitlements that become due to every human person at the commencement of life. Thus, the only qualification for earning them is the act simply of being human. It follows that rights are not granted by government(s) but accrue to human beings naturally.⁷⁸¹ Law and governments only affirm this reality. Because of their centrality to human worth and dignity, rights have become an important subject and pillar of contemporary constitutions. The issue of their recognition, promotion and protection is generally given centre-stage.⁷⁸² Indeed, as Mutakha-Kangu observes, most countries claim to be founded upon a jurisprudence and culture of protection and promotion of fundamental rights and freedoms.⁷⁸³ Constitutions are therefore judged based on how effectively they secure fundamental human rights and liberties. In the modern society, it is becoming increasingly difficult to fathom a constitution without a Bill of Rights.

So crucial are human rights that in Kenya's context the problems of the Bill of Rights in the repealed Constitution were a prominent reason why the people opted for constitution review in the first place. There are several accounts why the preceding Bill of Rights was invariably considered retrogressive and obsolete. One explanation is that the chapter of the Bill of Rights⁷⁸⁴ was replete with limitations, whose enormity had rendered the enjoyment of

781 The 2010 Constitution at article 19(3)(a) takes cognizance of the fact that rights and fundamental freedoms 'belong to each individual and are not granted by the State'.

782 J Mutakha-Kangu 'The theory and design of limitation of fundamental rights and freedoms' (2008) 4/1 *The Law Society of Kenya Journal* 1.

783 As above.

784 Chapter V of the repealed Constitution on 'protection of fundamental rights and freedoms of the individual'.

human rights peripheral. A writer noted of the repealed Bill of Rights thus:

Indeed, one of the biggest problems with fundamental human rights in Kenya stems from the issue of limitation of rights. The Kenyan Bill of Rights has even been described as a bill of exceptions rather than rights.⁷⁸⁵

True, the Bill of Rights was littered with ‘claw-back’ clauses that often defeated the very essence of guaranteeing human rights.⁷⁸⁶ Hiding behind the internal limitations assigned specific rights as well as the general limitation clause entailing that rights would be restricted for greater public interests,⁷⁸⁷ for example, of public safety, security and health,⁷⁸⁸ State authorities tended to restrict rather

785 Mutakha-Kangu (n 782 above) 1.

786 The following excerpt from the old Constitution is illustrative of how rights would be provided for and limited extensively within the same clause in what came to be called ‘claw back’ clauses. Section 80, for instance, read:

- (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.
- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision:
 - (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
 - (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;
 - (c) that imposes restrictions upon public officers, members of a disciplined force, or persons in the service of a local government authority; or
 - (d) for the registration of trade unions and associations of trade unions in a register established by or under any law, and for imposing reasonable conditions relating to the requirements for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or of members necessary to constitute an association of trade unions qualified for registration, and conditions whereby registration may be refused on the grounds that another trade union already registered or association of trade unions already registered, as the case may be, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought), and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

787 Section 70, repealed Constitution.

788 See for example the limitations in section 81(3)(a) & (b) of the repealed Constitution.

than promote and protect human rights. Due to these limitation clauses, the Bill of Rights ended up taking away rights more than it guaranteed them.

The ‘claw back’ clauses also found favour in the manner in which the repealed Constitution was interpreted. The Judiciary, which was entrusted with the task of protecting fundamental rights and individual liberties, had adopted a very restrictive approach to human rights litigation and constitutional interpretation. In one instance, the High Court dismissed an applicant’s pleadings on the technical ground that he did not identify which constitutional provision had been contravened.⁷⁸⁹ In *Koigi wa Wamwere v Attorney General*,⁷⁹⁰ the Court held that section 72 of the Constitution protected the fundamental right to liberty, but did not specify the manner in which arrests could be made, or where such arrests could be effected. The tribunal declined to concern itself with extradition or the manner in which police officers carry out their duties.

Regarding the general approach to constitutional interpretation, in *Republic v Elman*,⁷⁹¹ the High Court early on set the precedent that the Constitution is to be taken as any other piece of legislation and ought to be interpreted in a strict, rigid, legalistic and conservative manner which is to the detriment of human rights. That position, however, seemed to change during the sunset days of the old order. The High Court reviewed in 2004 that:

The Constitution is not an Act of Parliament and is not to be interpreted as one. It is the supreme law of the land; it is a living instrument with a soul and consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles.⁷⁹²

Within the decade prior to the 2010 Constitution, there were many other progressive judicial precedents although it was still difficult to establish a trend. For instance, in *Roy Richard Elirema and another*

789 *Kenneth Njindo Matiba v The Attorney General*, HCCC Miscellaneous application number 666 of 1990.

790 Miscellaneous application NC. number 574/90.

791 *Republic v Elman* [1969] EA 357.

792 *Njoya and 6 others v Attorney General and 3 others* (number 2) 277.

v Republic,⁷⁹³ a superior court of record held, *inter alia*, that the right to fair trial means that one must be prosecuted by a competent person. In *George Ngothe Juma and two others v Attorney General*,⁷⁹⁴ the High Court held that an accused person had the right to access prosecution's information relating to the charge in advance, especially witness statements, to be able to adequately prepare his/her defence. The challenge, however, was that the Judiciary never evolved a certain and predictable philosophy to guide in the interpretation of the Bill of Rights, and the realization of rights remained a coincidence rather than a guarantee. A writer correctly observed:

That the issue of the proper approach to constitutional interpretation has haunted Kenyan courts for as long as we have been independent ... the courts adopted an unprincipled, eclectic, vague, pedantic, inconsistent and conservative approach to constitutional interpretation.⁷⁹⁵

While Chapter V of the repealed Constitution contained provisions relating to the protection of fundamental rights and freedoms and the circumstances for derogation, these entitlements were limited to the traditional civil and political rights and did not expressly encompass other fairly important genres of rights like socio economic rights, women's rights, children's rights, rights of persons with disabilities or even concerns such as non discrimination of persons with HIV/AIDS. For example, despite ratifying the International Covenant on Economic Social and Cultural Rights (CESCR),⁷⁹⁶ the State hardly took any deliberate legislative steps to wholly domesticate its obligations under the Treaty.⁷⁹⁷ Socio-economic rights were neither contained in the repealed Constitution nor in a separate Bill of Rights. Moreover, judicial tribunals did not play a critical role in

⁷⁹³ Nairobi Criminal Appeal number 67 of 2002.

⁷⁹⁴ Nairobi High Court Miscellaneous application number 34 of 2001.

⁷⁹⁵ M.Thiankolu 'Landmarks from *El Mann* to the Saitoti ruling: Searching a philosophy of constitutional interpretation in Kenya' 7, obtainable at www.kenyalaw.org. See, also, G Muigai 'Political jurisprudence or neutral principles: Another look at the problem of constitutional interpretation' 2004 *East African Law Journal* 1.

⁷⁹⁶ Adopted by the UN General Assembly on 16 December 1966, entry into force 3 January 1976; acceded to by Kenya on 1 May 1972.

⁷⁹⁷ Concluding observations of the Committee on Economic, Social and Cultural Rights: Kenya. 03/06/93. E/C.12/1993/6 Para 10.

their enforcement using the international instruments ratified by the State. It was therefore an accurate assessment that,

The scope of the human rights protections is rather limited, in terms of those who are protected, in the types of rights protected and in the range of those who are bound by the duties associated with the rights. There is no provision of social and economic rights; and nothing to ensure the basic needs of Kenyans. There is nothing on solidarity rights (peace, development, or environment). Such cultural rights as exist are somewhat negative; culture, in the form of customary law, justifies exceptions to equality rights, which mainly disadvantages girls and women. There are no special provisions for minorities; the Constitution says nothing about the rights of the child, the elderly or disabled persons; the protection against discrimination applies only to citizens of Kenya. Even in the area of civil and political rights, not all are protected: for example there is no recognition of privacy, or rights of political or other forms of people's participation; the right of an accused to fair trial does not oblige the state to provide a lawyer to the accused even in cases where the death penalty may be imposed. Many modern constitutions are more explicit in the rights of particular sections of society, which in the Kenyan context should include pastoral communities, consumers, prisoners and people on remand, refugees, trade unionists. It does not give citizens a right to obtain information held by the government and thus minimises opportunities for people to scrutinise the efficiency, integrity and honesty of public authorities.⁷⁹⁸

Hansungule was equally correct when he commented:

The current Constitution is not exactly "human rights friendly". Since 1963, Kenya has ratified or acceded to a number of international and regional human rights instruments which have increased the range of human rights standards designed to benefit the people. For example, there are now specific protections of women's rights as well as those of children in international conventions and declarations, which are not captured in the post colonial constitution of Kenya. In theory, at least, Kenya has a Bill of Rights just like any other country with a written constitution. However, in practice, the Bill, far from reflecting the interests of the ordinary Kenyans, represents the parochial interests of the ruling class.⁷⁹⁹

798 Report of the Constitution of Kenya Review Commission 2002.

799 M Hansungule 'Kenya's unsteady march towards the lane of constitutionalism' (2003) 1 *University of Nairobi Law Journal* 43.

Kenya's repealed constitutional dispensation also fell far below the 'equal protection' threshold in at least three cardinal respects. First, although the Constitution prohibited discrimination on a number of grounds, differentiation (especially on the basis of gender) was permitted in matters of personal law such as adoption, marriage, divorce, burial and devolution of property on death.⁸⁰⁰ Second, the repealed Constitution did not list exhaustively the grounds upon which discrimination was proscribed. Glaringly omitted from this Constitution were exclusions on the grounds of disability, health status, sexual orientation, to list but a few. It is instructive however, that a number of 'sectoral' legislations were later enacted to cater for some other categories of people who were not sufficiently protected constitutionally. Such categories include persons with disabilities, whose needs were addressed by the Persons with Disabilities Act,⁸⁰¹ persons with HIV/AIDS, through the HIV/AIDS Prevention and Coordination Act,⁸⁰² women, through the National Commission on Gender and Development Act⁸⁰³ and children, through the Children Act.⁸⁰⁴ These sectoral approaches to equality and human rights were hardly successful hence the desire for a comprehensive equality and non-discrimination law. Third, affirmative action, as a substantive equality principle, was without constitutional expression in Kenya.

The Bill of Rights was further faulted as inadequate by modern standards, because its enforcement procedures and institutions were wanting. The repealed Constitution had no specialized bodies like an Ombudsman or Human Rights Commission for promoting or enforcing rights; there was no proper legal aid to enforce rights, and few effective remedies.

BILL OF RIGHTS UNDER THE 2010 CONSTITUTION

Under the 2010 Constitution, the Bill of Rights is presented as an integral part of Kenya's democracy and the framework for social,

800 Section 82(4)(b), repealed Constitution.

801 Persons with Disabilities Act, 2003.

802 HIV/AIDS Prevention and Coordination Act, 2006.

803 National Commission on Gender and Development Act, 2009.

804 Children Act, 2001.

economic and cultural policies.⁸⁰⁵ It thus has both juridical and extra-juridical utility. Applied in the later form, it runs beyond the precincts of the law and judicial tribunals to be the thread that weaves through national policies and agenda. This is consistent with the purpose of the Bill of Rights which is 'to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings'.⁸⁰⁶ The Bill of Rights is envisioned to have all round application.

Compared to the Bill of Rights in the repealed Constitution or in many other contemporary jurisdictions, the 2010 Constitution is unique in a number of critical respects. It exhibits the following salient features – it has a near exhaustive catalogue of entitlements, contains the different genres of human rights; provides for an expansive 'non-discrimination clause'; expresses regard for substantive equality (affirmative action); reserves certain rights from derogation; carries special regulation of emergencies; espouses a conservative strain of moral philosophy; opts for a centralized limitation clause as opposed to multiple internal limitation clauses; and has both vertical and horizontal implications. The Bill of Rights also comes with viable enforcement apparatuses.

Bill of Rights: A near exhaustive catalogue of entitlements

The new Bill of Rights contains a most exhaustive catalogue of human rights. These entitlements include the right(s) to: life, equality and freedom from discrimination, human dignity, freedom and security of the person, slavery, servitude and forced labour, privacy, freedom of conscience, religion, belief and opinion, freedom of expression, freedom of the media, access to information, freedom of association, assembly, demonstration, picketing and petition, political rights, freedom of movement and residence, protection of the right to property, labour relations, environment, economic and social rights, language and culture, family, consumer rights, fair administrative action, and access to justice.⁸⁰⁷ In addition, the Bill of

805 Article 19(1).

806 Article 19(2).

807 See, articles 26 to 48 of the 2010 Constitution.

Rights has elaborate protection of arrested persons,⁸⁰⁸ the right to fair hearing⁸⁰⁹ and the rights of persons detained, held in custody or imprisoned.⁸¹⁰ There is express and specific protection of children,⁸¹¹ persons with disabilities,⁸¹² youth,⁸¹³ minorities and marginalised groups⁸¹⁴ and older members of society.⁸¹⁵ What follows is a detailed discussion of these rights.

Right to life

The 2010 Constitution guarantees the right to life in very precise terms. It begins with affirming this right then proceeds to acknowledge that life begins at conception.⁸¹⁶ The article further prohibits arbitrary deprivation of life. Specifically, abortion is expressly prohibited unless, in the opinion of a trained health professional, there is need for emergency treatment.

It has been argued, and rightly so, that the right to life is the most fundamental right on the basis of which other rights accrue.⁸¹⁷ As a matter of fact, a person cannot claim any other right if his or her right to life has been violated. Due to its importance, some countries have enlisted it as a non-derogable right.⁸¹⁸ It is probably against this backdrop that the High Court was stunned that ‘life

808 Article 49.

809 Article 50.

810 Article 51.

811 Article 53.

812 Article 54.

813 Article 55.

814 Article 56.

815 Article 57.

816 Article 26 states, ‘(1) Every person has the right to life. (2) The life of a person begins at conception. (3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law. (4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.’

817 See O Nmehielle *The African human rights system: Its laws, practice and institutions* (2001) 85.

818 See S Davidson *The Inter-American human rights system* (1992) 262-263.

is not one of those fundamental rights which may not be limited under section 25 of the Constitution'.⁸¹⁹

A critical reading of article 26(3) leads to the conclusion that, although the Constitution prohibits extra-judicial killing, it does not outlaw the death penalty. It appears that deprivation of life could be justified by either the 'Constitution or other written law'.⁸²⁰ A High Court judge however, holds the view that this article '(on deprivation of life) is inconsistent with the right to life preserved under article 26(1) of the Constitution'.⁸²¹

The tacit retention of the death penalty (aside from occasioning an internal contradiction) also runs counter to the current trend in international human rights practice where lesser penalties are meted on capital offenders. In fact, the language of CCPR strongly suggests that the abolition of death penalty is desirable.⁸²² This view is further illustrated by the UN General Assembly's adoption of the 2nd Optional Protocol to the CCPR⁸²³ and the general reluctance by those states that have retained capital punishment on their statute books to exercise it in practice. The African Commission has also encouraged this trend by adopting a 'Resolution Urging States to envisage a Moratorium on the Death Penalty',⁸²⁴ which urges all states party to the African Charter to take all measures to refrain from exercising the death penalty.⁸²⁵ Accordingly, the African Commission:

819 *Republic v John Kimita Mwaniki* [2011] eKLR.

820 According to article 26(3), 'A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.'

821 *Republic v John Kimita Mwaniki*, page 26.

822 General Comment number 06: The right to life (article 6). Para 6. Human Rights Committee.

823 Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989. This Optional Protocol was aimed at the abolition of the death penalty. Thus far, Kenya has refrained from acceding to this treaty, perhaps, indicating the Government's unpreparedness to eliminate death sentence. Kenya also abstained from voting for a UN Draft Resolution calling for the abolition of death penalty during the 61st Session of the UN Commission on Human Rights See, Position Paper number 2 on the Abolition of Death Penalty. Kenya National Commission on Human Rights. Page 5.

824 Adopted at 26th Ordinary Session on 15 November 1999, ACHPR/ Res.42(XXVI) 99.

825 The African Commission re-stated this position in Communication 240/2001, *Interights et al (on behalf of Mariette Sonjaleen Bosch) v Botswana*, Seventeenth Annual

Urges all states parties ... that still maintain the death penalty to comply fully with their obligations under the treaty and to ensure that persons accused of crimes for which the death penalty is a competent sentence are afforded all the guarantees in the African Charter ... Calls upon all states that still maintain the death penalty to: (a) limit the imposition of the death penalty only to the most serious crimes; (b) consider establishing a moratorium on executions of death penalty; (c) reflect on the possibility of abolishing death penalty.⁸²⁶

The Commission has in several instances attempted to enforce this resolution. For example, it was reported that during the 31st Session of the Commission in May 2002, one Commissioner asked the delegation from Cameroon: 'the death sentence is still in the criminal code but it has been said that for more than 15 years there has been no execution. Are there any efforts to guarantee the right to life and thus abolish the death sentence?'⁸²⁷ Vividly, the Commission perceives the abolition of death penalty as a guarantee to the right to life.

Institutions of justice in Kenya now appreciate this human rights approach to the question of death penalty. In *Godfrey Ngitho Mutiso v Republic*,⁸²⁸ the Court of Appeal expressed its contempt for mandatory death sentence in the following terms:

We may stop there as we have said enough to persuade ourselves that this appeal is meritorious and the Attorney General was right to concede it. On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that

Activity Report of the African Commission on Human and Peoples' Rights (Annex VII), para 52.

826 'Resolution Urging the State to Envisage a Moratorium on the Death Penalty', adopted at 26th Ordinary Session on 15 November 1999, ACHPR/Res.42 (XXVI) 99.

827 R. Murray 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems' (2001) 1 *African Human Rights Law Journal* 2.

828 Criminal Appeal number 17 of 2008 (unreported).

when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provision.

In similar vein, in *Evanson Muiruri Gichane v Republic*,⁸²⁹ the superior court opted for the lesser sentence other than death penalty when it emerged that the Penal Code proffered two contradictory sentences for the offence of attempted robbery – mandatory death penalty⁸³⁰ and imprisonment for up to 7 years.⁸³¹

The importance of the right to life cannot be overlooked, especially within the context of Africa generally and Kenya in particular. This is especially because it is one of those rights that have been violated with impunity by successive political regimes which have engaged in endless power struggles and extra-judicial killings.

Equality and freedom from discrimination

The 2010 Constitution permits every individual to enjoy the rights and freedoms it recognizes and guarantees in the Constitution without distinction of any kind, such as race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.⁸³² The exclusion of individuals from enjoying rights on the basis of any of

829 [2010] eKLR.

830 Section 297 of the Penal Code reads: (1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years. (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

831 According to section 389 of the Penal Code: 'Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.

832 See article 27(4).

these distinctions may therefore amount to discrimination. The term 'discrimination' means any distinction, exclusion or preference that has an effect of nullifying or impairing equal enjoyment of rights.⁸³³ Although discrimination is a particular form of differentiation, the two concepts are distinct. Discrimination refers to differentiation on subjective criteria like those mention in article 27(4) of the Constitution.

The right to equality and non-discrimination, therefore, does not exclude reasonable measures intended to protect or support individuals who were previously marginalised or historically disadvantaged. Such measures are generally referred to as affirmative action or 'positive discrimination.' Differentiation therefore will not amount to discrimination if it is intended to redress imbalances in society and if it does not result in the violation of the right to equality and other associated rights. Article 27(6) of the Constitution captures this position by emphasising that:

To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

The High Court, in *John Kabui Mwai and 3 others v Kenya National Examination Council and 2 others*,⁸³⁴ read from this quite helpful script. While affirming a government policy affording less privileged children in public schools an opportunity to join prestigious national schools even with lesser examination points than their assumedly better-off counterparts in private schools, justices Gacheche, Dulu and Muchelule recognised that 'not all distinctions resulting in differential treatment can properly be said to violate equality rights'.⁸³⁵ In the wisdom of the judges:

The special provisions of article 27(6) make it a unique set of constitutional provisions. When the Constitution was adopted, the

833 See Communication 241/2001, *Purohit and Moore v Gambia*, Sixteenth Annual Activity Report of the African Commission on Human and Peoples Rights (Annex VII) para 61.

834 [2011] eKLR.

835 As above.

framers knew, and clearly had in mind, the different status of persons in the society and the need to protect the weak from being overrun by those with ability. They had in mind the history of this country, both the differences in endowment either by dint of the region where one came from or as a function of other factors, which might necessitate special protection. Rightly or wrongly, and it is not for the courts to decide, the framers of the Constitution manifestly regarded as inadequate a blanket right to equal treatment, and their intention was to remedy the perceived societal inequalities thus recognizing the necessity of corrective measures, namely those envisaged in article 27(6), which were at the same time given the status of constitutional guarantee.⁸³⁶

In view of these facts:

... It is only by examining the larger context that a court can determine whether differential treatment results in equality or whether, on the other hand, it would be identical treatment which would in the particular context result in inequality or foster disadvantage.⁸³⁷

Additionally, the State is obliged to 'take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.'⁸³⁸ This is in the spirit of ensuring that women and men are treated equally and have the right to equal opportunities in political, economic, cultural and social spheres. Overtly, the new Constitution has sought to reverse the trend of discrimination that has over the ages been perpetrated against women.

On a most regrettable note, however, sections of the High Court may not share this position. Justices Mwera, Warsame and Mwilu, for instance, declined to find that the JSC erred in failing to ensure at least one-third representation of women in the composition of the Supreme Court.⁸³⁹ The applicants in this cause, Federation of Women Lawyers (FIDA-K), Centre for Rights Education and Awareness (CREAW), The League of Kenya Women Voters, Women

836 As above.

837 As above.

838 Article 27(8).

839 *Federation of Women Lawyers Kenya (FIDA-K) and 5 others v Attorney and another* [2011] eKLR.

in Law and Development in Africa (WILDAF), Caucus for Women Leadership and Coalition on Violence Against Women (COVAW), had asked the Court to nullify the nominations made by the JSC and approved by the President (in consultation with the Prime Minister) which appointments were skewed in favor of the male gender – 4 out of the 5 appointed judges were male. The High Court ruled that affirmative action measures as designed by article 27 of the 2010 Constitution are not rights *qua* rights but are rather ‘inspirational’ only creating a ‘legitimate expectation on the part of the citizens that the Government would indeed formulate and undertake legislative and policy measures’.⁸⁴⁰ The Court further found that even these ‘inspirational affirmative action measures’ are not to be immediately expected, since, they, like socio-economic rights, are subject to the scheme of ‘progressive realisation’. Accordingly, affirmative action measures

...are by their nature progressive in character since enactment of legislation and formulation of policies is basis of determining the realisation and achievement of such rights. It is therefore right to say that since they are to be achieved through legislation and policy measures, they are progressive in character and can only be attained over a period of time. We agree ... that the rights under Article 27(6), (7) and (8) are inspirational in nature.⁸⁴¹

The Court also noted that to say that article 27 gives an immediate and enforceable right to any particular gender in so far as the two thirds principal is concerned is unrealistic and unreasonable.⁸⁴² Consequently, affirmative action remains an abstract principle which can only be achieved through an enabling legislation by Parliament.⁸⁴³ Even more detrimental to the general principle of equality and non-discrimination, the High Court resolved that, article 27 ‘imposes no duty on the part of the Government other than the requirement to progressively take legislative and other measures to implement the said principle’ and further that article 27 ‘does not address or impose

840 As above.

841 As above.

842 As above.

843 As above.

duty upon the Judicial Service Commission in the performance of its constitutional, statutory and administrative functions'.⁸⁴⁴

Discrimination against women in most Kenyan communities is mainly perpetuated by the tendency to uphold certain mundane socio-cultural beliefs and practices. In fact, some practices, such as female genital mutilation, are harmful and pose a threat to the health of women and the girl-child. Women have also been previously denied equal opportunities when it comes to participation in governance and other public activities. They are in most cases expected to ratify decisions made by their male counterparts without registering any reservations. To reverse this trend, the government should spearhead the initiative to modify those social and cultural patterns that are discriminative against women. This could be achieved by, for example, conducting public education, information and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men. The Constitution has already set the momentum by requiring gender balance in both elective and appointive positions.

In some legal systems, a nexus has been drawn between the right to non-discrimination and human dignity. The African Commission, for example, emphasised that this right should be zealously guarded and forcefully protected 'in accordance with the well established principle that all human beings are born free and equal in dignity and rights'.⁸⁴⁵ In other words, discrimination undermines a person's dignity by suggesting that he or she is inferior to the rest. Human dignity is an inherent basic right to which all human beings, regardless of their capabilities or disabilities, as the case may be, are entitled to without discrimination. It is therefore an inherent right, which 'every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right'.⁸⁴⁶

844 As above.

845 *Purohit and Moore v Gambia* (n 833 above) para 35-38.

846 As above, para 57.

The rights to equality and freedom from discrimination guarantee equality before the law as well as equal protection and benefit of the law.⁸⁴⁷ Consequently, it gives no room to any law that is discriminatory either of itself or in its effect. This right would be violated when, for instance, a public authority in the performance of the functions of its office discriminates against any person. The same could be said of a law that treats people in a discriminatory manner in respect of, for example, access to shops, hotels, lodging-houses, public restaurants or places of public entertainment.

Human dignity

The 2010 Constitution recognizes the inherent dignity that resides in every person and the right to have that dignity respected and protected.⁸⁴⁸ The need to respect and protect human dignity is the essence of the human rights discourse. In other words, the ultimate aim of human rights protection is to secure an individual's intrinsic human dignity. By definition, human rights are demands or claims individuals or groups make that are essential for individual well being, dignity, and fulfillment, the deprivation of which may lead to a great affront to justice.⁸⁴⁹ Accordingly, they stand above the ordinary laws of the land. The right to human dignity may therefore be guaranteed in a number of ways, including affording one the opportunity to freely develop his or her personality.

Freedom and security of the person

Article 29 of the Constitution provides:

Every person has the right to freedom and security of the person, which includes the right not to be:

- (a) deprived of freedom arbitrarily or without just cause;
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

847 Article 27(1).

848 Article 28.

849 H Laski *A grammar of politics* (1967) 91-92.

- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner.

This article guarantees individuals physical liberty by prohibiting a number of wrongful acts namely, (i) arbitrary deprivation of freedom (ii) detention without trial (iii) subjection to any form of violence (iv) torture (v) corporal punishment (vi) cruel, inhuman or degrading treatment. The wordings of article 29(a) are indicative of the fact that freedom could be deprived if there is a just cause. What the provision prohibits therefore is the arbitrary deprivation of freedom. Essentially, a person cannot challenge arrest and detention that is conducted with due respect to the existing laws of the country. Similarly, detention without trial is permissible in Kenya, but only during a state of emergency.

Although the 2010 Constitution sanctions ‘legitimate’ deprivation of freedom and detention without trial, it is encouraging to note that it unequivocally prohibits all forms of violence ‘from either public or private sources.’ This provision appears to outlaw any form of physical or mental violence directed at a person. Personal violence may take many different forms including torture, corporal punishment, sexual abuse, neglect or maltreatment. Article 1 of the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any

reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official

capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Torture has in the past been common especially in the course of extracting evidence from accused persons by police officers. As an effort aimed at averting this genre of torture, the law was amended in 2003 to require that any confession of a fact tending to prove the guilt of an accused person must be made in court as opposed to before police officers.⁸⁵⁰ These changes earned convicted persons dignity and protection from inhuman treatment in addition to making the prospects of torture by the police, in an attempt to procure confessions, quite improbable. In 2007 however, the Evidence Act was further reviewed to re-allow police officers above the rank of Chief Inspector the power to extract confessions from criminal suspects.⁸⁵¹ Though a retrogressive step, the amendment was still cautious enough to provide that such confessions have to be admitted in the presence of the suspect's lawyer or other person of choice. Moreover, an officer investigating a case is not permitted to take confessions.

As regards corporal punishment, the main positive development prior to the 2010 Constitution was the passing of the *Criminal Law (Amendment) Act*⁸⁵² which enactment outlawed corporal punishment for convicted prisoners.

Generally, incidences of personal violence are rampant in Kenya. For example, some parents or guardians use excessive force to discipline their children by resorting to measures which normally lead to their physical or mental harm. Such abhorrent practices have also been reported in some institutions of learning where children are 'unreasonably chastised' in the name of imparting discipline. Further, some cultural practices, such as circumcision of children without their consent, may also be classified as personal violence, torture or abuse. Traditional circumcision exposes children to untold psychological suffering and often ends in physical torture. In this time and age of anesthetics, it is perturbing to see children

850 See the new section 25A of the *Evidence Act*.

851 Amendment number 7 of 2007. Section 25A, *Evidence Act*.

852 Act number 5 of 2003.

being exposed to painful and horrific experiences in the name of traditional circumcision rites.

The scope of personal violence may also extend to domestic or gender-based violence. This is a form of violence that is directed at persons, especially women, by virtue of their perceived 'inferior' gender. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. According to the Committee on the Elimination of all forms of Discrimination Against Women (CEDAW), there is a close nexus between violence against women and gender-based discrimination. This is because, in its General Recommendation no. 19, the Committee was emphatic that:

...The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty...⁸⁵³

This partly explains why the international community has lately embarked on concerted efforts to prohibit violence against women. For instance, after the 1993 World Conference on Human Rights held in Vienna, the UN Assembly adopted the 'Declaration on the Elimination of Violence Against Women' (DEVAW).⁸⁵⁴ The declaration recognised that women experience violence, not only in the family and community, but also through the state and its agencies.⁸⁵⁵ The declaration envisages the adoption of a multi-agency approach to tackling violence against women, involving both states and Non-Governmental Organisations (NGOs).⁸⁵⁶

Another remarkable initiative by the international community in this regard was the appointment of the UN Special Rapporteur on violence against women in 1994.⁸⁵⁷ The rapporteur has done a

853 See General Recommendation 19, UN Doc A/44/38 (1990) para 6.

854 Declaration on the Elimination of Violence against Women, GA Res 48/104 of 20 December 1993. See H Charlesworth & C Chinkin *The boundaries of international law* (2000) 12-14.

855 Declaration on the Elimination of Violence against Women (note 41 above) article 2.

856 As above, article 4.

857 See United Nations Commission on Human Rights Resolution 1994/45 on the question of integrating the rights of women into human rights mechanisms of the UN and the elimination of violence against women, adopted on 4 March 1994.

tremendous job in documenting instances and causes of violence against women.⁸⁵⁸ Further, in 1995, the 'Beijing Declaration and Platform for Action' was adopted, identifying violence against women as one of the 12 areas of gross concern.⁸⁵⁹ The document enjoined states in the strategy to prevent violence against women within their respective societies.⁸⁶⁰ A subsequent review conducted on the implementation of the 'Beijing Declaration and Platform for Action' revealed that commendable progress had since been made in recognising violence against women as a form of human rights violation.⁸⁶¹

Africa, as a region, has also attempted to address the issue of violence against women. For instance, in 2004, the AU adopted the 'Solemn Declaration on Gender Equality in Africa', which proscribes violence and abuse against women and girls, particularly during armed conflicts.⁸⁶² The declaration, save for the fact that it has no binding legal force, is a pointer towards the right direction in tackling sexual assault committed in the context of armed conflicts. It is sad to note that during armed conflicts, sexual violence against women is usually perpetrated, 'either as an encouragement for soldiers or as an instrument of policy.'⁸⁶³ However, little has been done over the years to curtail the rising incidences of war-related sexual violations. It was not until the creation of the International Criminal Tribunal for the former Yugoslavia (the ICTY) and later,

858 See, for example, Special Rapporteur on Violence Against Women in the Family E/CN.4/1996/53 and E/CN.4/1999/68; Special Rapporteur on Violence Against Women Violence against women perpetrated or condoned by the state during times of armed conflict (1997-2000) E/CN.4/2001/73; and Special Rapporteur on Violence Against Women Cultural practices in the family that are violence towards women E/CN.4/2002/83.

859 'Beijing Declaration and Platform for Action' para 44, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995).

860 As above, Strategic Objective D1.

861 See Beijing + 5 Outcome Document reproduced in United Nations *Beijing to Beijing + 5: Review and appraisal of the implementation of the Beijing Platform for Action* (2001) 195, section D para 13.

862 'Solemn Declaration on Gender Equality in Africa', Assembly/AU/Decl 12 & 13 (III), Assembly of Heads of State and Government 3rd ordinary session 6-8 July 2004, Addis Ababa.

863 T Meron 'Rape as a crime under international humanitarian law' (1993) 87 *American Journal of International Law* 424.

the International Criminal Tribunal for Rwanda (the ICTR), that these crimes received international attention.⁸⁶⁴

At least, the two tribunals have sent a signal that wartime abuses against women will henceforth be rigorously prohibited, prosecuted and punished.⁸⁶⁵ Be that as it may, cases of violence against women are still prevalent in Africa as a whole, in times of peace as in times of war. This is a clear indication that a colourful normative framework on this subject is not any meaningful if the same is not diligently implemented to the letter.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa⁸⁶⁶ (hereafter 'the Women's Protocol' or 'the Protocol') gives an interesting scope to the protection against violence. The Protocol enlists 'unwanted or forced sex' as a form of violence against women.⁸⁶⁷ However, it is not clear whether the drafters had 'marital rape' in mind when framing this provision. This has led to the contention that, since the provision suggests that violence may take place 'in private or public', there is a strong indication that unwanted or forced sex may as well be committed between spouses in the privacy of their homes.⁸⁶⁸ Accordingly, this implies that states parties to the Protocol are expected to introduce the crime of 'marital rape' in their statute books.⁸⁶⁹ However, it is generally difficult to prosecute this crime, especially because it involves the privacy and sanctity of the marriage institution. It has therefore not been easy for legal systems to formulate watertight

864 See K Askin 'Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunals: Current status (1999) 93 *American Journal of International Law* 101.

865 N Pillay 'The advancement of women's rights' (2002) 16 *Occasional Paper* Centre for Human Rights University of Pretoria.

866 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, 11 July 2003.

867 Article 4(2)(a). This provision requires states parties to take appropriate and effective measures to 'enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public.'

868 F Banda 'Building on a global movement: Violence against women in the African context' (2008) 8 *African Human Rights Law Journal* 13.

869 As above.

legislation on this crime, without being seen to be interfering with the privacy of the marriage institution.

To give effect to the right to freedom and security of the person, it is imperative for the government to undertake not only educative programmes on this right but also some protective measures, including, the establishment of special monitoring units to monitor the implementation of this right. Additionally, non-governmental actors can also initiate measures such as identification, reporting, investigation and follow-up of instances of violation of this right.

Slavery, servitude and forced labour

Article 30 of the 2010 Constitution guarantees protection from slavery or servitude and forced labour. Slavery is an age-old practice that has been evolving with time to take different forms. According to historians, slavery was institutionalized in Africa when the continent began to interact with Islamic jihadists, Arab merchants and later Euro-American slavers and imperialists.⁸⁷⁰ In the seventh century, the continent experienced successive waves of military assault, massive destructions and killings. As soon as the Arab traders arrived in Northern Africa, they began to organise military expeditions and slave raids into the southern regions of Morocco and as far south as the boundaries of ancient Ghana. It is reported that in several occasions, they unleashed persecution, summary execution, illegal expulsion and arbitrary arrests on the inhabitants of those areas in the name of 'hunting' for slaves.⁸⁷¹

Perhaps, it is on the basis of the fact that slavery is a dehumanising practice that the 2010 Constitution seeks to abolish it. Slavery has been one of the greatest violations of human rights ever to be committed in Africa and on Africans. Slavery and servitude in their contemporary forms include practices such as: illegal sale and traffic in human beings, pledging of young girls for debts, forced marriages in exchange of dowry; use of domestic servants for extremely low pay; child labour; and forced labour.⁸⁷²

870 E Alemika 'Protection and realisation of human rights in Africa' in A Kalu & Y Osinbajo *Perspectives on human rights* (1992) 153.

871 As above.

872 E Ankumah *The African Commission on Human and Peoples' Rights* (1996) 119.

Article 2 of the ILO Convention (no. 29) Concerning Forced or Compulsory Labour⁸⁷³ defines forced labour as follows:

(1) For the purposes of this Convention the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

(2) Nevertheless, for the purposes of this Convention, the term forced or compulsory labour shall not include:

- (a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;
- (b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
- (c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;
- (d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;
- (e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

Statistics indicate that at least 12.3 million people around the world are trapped in forced labour.⁸⁷⁴ The victims, who are mostly

873 Adopted by the General Conference of the International Labour Organisation on 28 June 1930; entered into force on 1 May 1932.

874 See ILO 'Forced Labour' available at http://www.ilo.org/global/Themes/Forced_Labour/lang--en/index.htm (accessed on 26 October 2010).

women and girls, are usually forced into prostitution, trapped in debt bondage, or are farm workers kept there by illegal tactics and paid little or nothing.⁸⁷⁵ Unfortunately, the problem presented by the provisions of article 30 relating to slavery and forced labour is that of enforcement. Modern day slavery, in particular, is a violation that cannot easily be traced to states because individuals mostly perpetrate it.⁸⁷⁶ It is often rooted in traditional and religious practices.

Privacy

The 2010 Constitution secures to individuals the right to determine the extent to which their personal affairs could be communicated to others. It guarantees the right to privacy in the following terms:

Every person has the right to privacy, which includes the right not to have:

- (a) their person, home or property searched;
- (b) their possessions seized;
- (c) information relating to their family or private affairs unnecessarily required or revealed; or
- (d) the privacy of their communication infringed.⁸⁷⁷

The right to privacy is recognised in the UDHR, the CCPR and in many other international and regional treaties. This right is directly connected to other rights and freedoms such as human dignity, freedom of association and freedom of speech.⁸⁷⁸ Article 31 of the 2010 Constitution stipulates three types of privacy rights, namely, (i) personal/bodily (ii) territorial and (iii) informational. Personal or bodily privacy concerns the protection of the person against invasive procedures such as drug testing and cavity searches.⁸⁷⁹ Territorial privacy, on the other hand, concerns the setting of limits on

875 As above.

876 As above.

877 Article 31, 2010 Constitution.

878 See the Australian Privacy Charter, published by the Australian Privacy Charter Group, Law School, University of New South Wales, Sydney 1994.

879 See Global Internet Liberty Campaign 'Privacy and Human Rights: An international survey of privacy laws and practice' available at <http://gilc.org/privacy/survey/intro.html> (accessed on 26 October 2010).

intrusion into an individual's domestic and other environments such as the workplace or public space.⁸⁸⁰ Information privacy involves the establishment of rules governing the collection and handling of personal data such as credit information and medical records.

Freedom of conscience, religion, belief and opinion

The Bill of Rights guarantees the protection of a number of interrelated entitlements – right to freedom of conscience, religion, thought, belief and opinion.⁸⁸¹ Generally, these rights entitle a person to hold a belief, opinion or conviction, be it of cultural, religious, political or any other nature. Specifically, the rationale of entrenching freedom of conscience in the Constitution is to allow an individual to hold a thought or belief that is independent of a state's or other entity's control *per se*.⁸⁸² Freedom of conscience in its broader sense envisages the right to profess and practice one's religion. This freedom, as contemplated under article 32(2), envisages the right to manifest one's religion or belief in public or in private, through worship, practice, teaching or observance. This includes observance of a day of worship. Though not expressly provided in the 2010 Constitution, the freedom to maintain or change one's religion or belief is anticipated in the enjoyment of this right.⁸⁸³

The 2010 Constitution proscribes discrimination based on belief or religious grounds. Thus, no one may be denied access to any institution, employment or facility, or the enjoyment of any right on the basis of their belief or religion. Likewise, a person shall not be compelled to act, or engage in any act, that is contrary to his or her belief or religion.⁸⁸⁴ While articulating this aspect, the African Commission observed that freedom of religion has to be exercised in a way that does not violate the equal protection of the law. It therefore condemned the blanket imposition of Islamic sharia

880 As above.

881 Article 32, 2010 Constitution.

882 Nmehielle (n 817 above) 104.

883 See J Harris, *et al*, *Law of the European Convention on Human Rights* (1998) 361.

884 Article 32(4), 2010 Constitution.

trials in Sudan and insisted on the right of everyone to be tried by a secular court if they wished.⁸⁸⁵

The Commission, however, has been careful to point out that freedom to manifest one's religion or belief does not in itself include a general right of the individual to act in accordance with his or her belief.⁸⁸⁶ Rather, while the right to hold religious beliefs should be absolute, the right to act on those beliefs should not. In *Gareth Anver Prince v South Africa*,⁸⁸⁷ a South African citizen alleged that the Law Society of South Africa had refused to register him for practice, given his disclosure of two previous convictions for the possession of cannabis and his stated intention to continue to use it because its use was required by his Rastafarian religion. He alleged violation of, among other provisions, article 8 of the African Charter, which guarantees freedom of religion and conscience. The African Commission held that the restrictions on the use and possession of cannabis were reasonable and a legitimate limitation of the right to freedom of religion.⁸⁸⁸ Indeed, participating in one's religion should not be at the expense of the overall good of the society. Religious minorities may freely choose to exercise their religion, yet that should not grant them unfettered powers to disregard the norms that keep the whole nation together.⁸⁸⁹

Freedom of expression

Article 33 of the 2010 Constitution guarantees everyone the right to freedom of expression. The scope of this right includes the freedom to seek, receive or impart information or ideas; freedom of artistic creativity; academic freedom and freedom of scientific research. The enjoyment of this right, however, precludes propaganda for war, incitement to violence, hate speech or advocacy of hatred. In

885 Communication 48/90, 50/91 and 89/93, *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V) para 73.

886 Communication 255/2002, *Gareth Anver Prince v South Africa*.

887 As above.

888 As above.

889 As above.

other words, an individual can only enjoy the right to freedom of expression subject to the rights and reputation of others.⁸⁹⁰

The right to freedom of expression is the cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion as it enables the society, when exercising its options, to be sufficiently informed.⁸⁹¹ The African Commission observed in *Media Rights Agenda and Constitutional Rights Project v Nigeria*,⁸⁹² that freedom of expression is a basic human right, vital to an individual's personal development, his/her political consciousness, and participation in the conduct of public affairs in his/her country.⁸⁹³

The case of *The Law Offices of Ghazi Suleiman v Sudan*⁸⁹⁴ provided the Commission with an opportunity to clarify its jurisprudence on the right to freedom of expression as well as to underscore the important link between freedom of expression and the promotion and protection of democracy in Africa.⁸⁹⁵ The case alleged that Mr. Ghazi Suleiman, a Khartoum based lawyer and human rights advocate was barred from travelling to deliver a public human rights lecture in Sinnar, Blue Nile State, in the Sudan. The author complained of a violation of article 9 of the African Charter, which guarantees the right to freedom of expression. In upholding the complaint, the African Commission observed:

In adopting the Resolution on the Right to Freedom of Association, the African Commission noted that governments should be especially careful that "in regulating the use of this right, that the competent authorities should not enact provisions which would limit the exercise of this freedom ... [and that] ... the regulation of the exercise of the right to freedom of association should be consistent with state's

890 Article 33(3).

891 See S Davidson (n 818 above) 310.

892 Communication 105/93, 130/94 & 152/96, *Media Rights Agenda and Constitutional Rights Project v Nigeria*, Twelfth Annual Activity Report of the African Commission on Human and Peoples Rights (Annex V).

893 As above, para 54.

894 Communication 228/99, *The Law Offices of Ghazi Suleiman v Sudan*, Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex VII).

895 See the analysis of this nexus in M Banderin 'Recent developments in the African regional human rights system' (2005) 5/1 *Human Rights Law Review* 130.

obligations under the African Charter on Human and Peoples' Rights."⁸⁹⁶ Mr. Ghazi Suleiman's speech is a unique and important part of political debate in his country.⁸⁹⁷

The Commission went on to affirm the views of the Inter-American Court of Human Rights to the effect that:

Freedom of expression is a cornerstone upon which the very existence of a society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.⁸⁹⁸

The above excerpt could therefore be taken to mean that when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual to disseminate information that is being violated but also the corresponding right of others to receive information and ideas. Hence, speech that contributes to political debate must be respected and protected.⁸⁹⁹ In light of the important role of the right to freedom of expression in the fledgling democracies in Africa today, these observations and findings of the African Commission must be received as landmark pronouncements.

Freedom of the media

In line with the right to freedom of expression, the 2010 Constitution expressly guarantees freedom of the media.⁹⁰⁰ The articulation of the right to freedom of the media as an independent entity apparently 'is a unique feature of our Constitution'.⁹⁰¹ According to Rawal J, 'all the courts of the world had taken in and protected the freedom

896 See 'Resolution on the Freedom of Association', adopted at the 11th Ordinary Session in Tunis from 2 to 9 March 1992. [Footnote retained].

897 *The Law Offices of Ghazi Suleiman v Sudan* (n 894 above) para 46.

898 As above, para 49, quoting from *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (articles 13 & 29 American Convention on Human Rights) Advisory Opinion OC-5/85, Series A. N.5, November 1985 at para 70.

899 *The Law Offices of Ghazi Suleiman v Sudan* (n 894 above) para 50.

900 Article 34.

901 *Kwacha Group of Companies and another v Tom Mshindi and 2 others* [2011] eKLR.

of press/ media under the umbrella of freedom of speech and expression'.⁹⁰² It may therefore be accurate to say,

Our Constitution has stolen a march over the Constitutions of many democratic states like USA and India by providing for a specific freedom for media, which has been intoned by the provisions of article 34.⁹⁰³

It is needless to emphasise that a free press contributes tremendously to establishing and maintaining an open and democratic society.⁹⁰⁴ In Kenya, for example, the media has played a critical role in sensitising the society on the importance of embracing democratic values and principles. Since the re-introduction of multi-party politics in the country in the early 1990s, the media has attempted to provide a discussion forum to enable the public to participate in the democratisation process. Lately, the Kenyan media has also played a watchdog role in the fight against corruption and related socio-economic vices.

The important role of the media in democratising the country notwithstanding, press freedom in Kenya has been more of a myth than a reality. The media has been a subject of political interference, in addition to their myriad economic, infrastructural and human resource constraints. These constraints have in the very least affected the freedom of the country's mass media. For freedom of the media to be realised, it is not enough to just have a flowery package of rights entrenched in the Constitution. Additionally, this freedom should be coupled with efforts to overcome every constraint that may stifle the media in their operations.

Freedom of association

Everyone is entitled to the right to free association.⁹⁰⁵ This right envisages a number of components. For example, it contemplates the freedom of individuals to come together for the protection of their interests by forming a collective entity which represents

902 As above.

903 As above.

904 Currie & De Waal (n 500 above) 374.

905 Article 36; Article 10(1) states: 'Every individual shall have the right to free association provided that he abides by the law.'

them. These interests may be of a political, economic, religious, social, cultural, professional or labour union nature. This is a 'two-fold' right in that, while it precludes the compulsion of a person to join an association of any kind, it also denies one the absolute right to become a member of an association. In other words, an association may decline to admit or continue the membership of an individual without necessarily infringing on his or her right to freedom of association. The right to freedom of association has also been interpreted to include the right to dissociation.⁹⁰⁶

In Kenya and Africa at large, the right to freedom of association has been violated with impunity in a number of occasions. These violations were manifested in the banning of political parties, persons being arrested because of their political belief and the prohibition of any assembly for a political purpose in a private or a public place. Because of such incidents, the 2010 Constitution appears to provide some safeguards for the enjoyment of this right by organisations or groups by ensuring that their registration is not withheld or withdrawn unreasonably.⁹⁰⁷ In the same way, before an organisation's registration is cancelled, it ought to be granted fair hearing.⁹⁰⁸ Generally, any legislation purporting to limit the right to freedom of association should be objective enough to enable one to know, before hand, the circumstances under which this right could be limited and the nature and extent of the limitation. As emphasised by the African Commission:

...authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards; ... in regulating the use of the right to association, the competent authorities should not enact provisions which will limit the exercise of the freedom and such a regulation should be consistent with state obligations under the Charter.⁹⁰⁹

906 Communication 101/93, *Civil liberties Organisation in Respect of the Nigerian Bar Association v Nigeria*, Eighth Annual Activity Report of the African Commission on human and Peoples' Rights (AnnexVI).

907 Article 36(3)(a).

908 Article 36(3)(b).

909 'Resolution on the Right to Freedom of Association, adopted by the African Commission on Human and Peoples' Rights', at its 11th Ordinary Session, See *Documents of the African Commission* 225.

Assembly, demonstration, picketing and petition

The right to freedom of assembly, demonstration, picketing and petition complements the right to freedom of association. The 2010 Constitution allows individuals to engage in meetings, picketing, protest marches and demonstrations, as long as the assemblers are peaceful and unarmed.⁹¹⁰ Actions or laws aimed at quelling armed or violent assemblies will therefore not constitute an infringement of this right.⁹¹¹ For instance, in *Commission Internationale de Juristes v Togo*,⁹¹² the African Commission found that the shooting at peaceful demonstrators by the Togolese military was a violation of this right.

Political rights

The 2010 Constitution guarantees citizens a wide array of political rights. From the wordings of article 38, these can be listed as the right to:

- (a) form, or participate in forming, a political party;
- (b) participate in the activities of, or recruit members for, a political party;
- (c) campaign for a political party or cause;
- (d) be registered as a voter;
- (e) vote by secret ballot in any election or referendum;
- (f) be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

Generally, article 38 presents different facets in which the right to political participation in Kenya may be enjoyed. In the main, the right is intended to ensure citizens participation in government either directly or through freely chosen representatives. Essentially, this means, subject to relevant electoral laws, citizens are entitled to participate in periodic elections either as candidates or voters.⁹¹³ The purpose of the article is therefore to allow an individual,

910 Article 37.

911 See the Constitution of the Republic of South Africa art 17. See also Nmehielle (n 817 above) 113.

912 Communication 91/93, *Commission Internationale de Juristes v Togo*.

913 Article 38(2) & (3), 2010 Constitution. See also Mbondenye (n 318 above) 185-186.

without apparent legal disability, to participate in periodic elections, exercise his or her voting rights, and participate in the conduct of public affairs directly or through freely chosen representatives. By extension, the provision requires state authority to be based on the sovereignty of the people.

It is rather unfortunate that many African states, not in the very least Kenya, have not taken heed of the citizens' right to political participation despite its fundamental importance to nation building. Consequently, their citizens have been victims of governments of exclusion such as dictatorships, military rule, or single-party autocracies. Ethnicity, corruption and vote rigging have also had a hand in derailing the democratic process on the continent.

It is encouraging to note that the importance of this right is resonated in the Constitutive Act of the African Union (hereafter 'CAAU' or 'the Act'). The Act condemns and rejects unconstitutional change of government.⁹¹⁴ In fact, it categorically states that a government that seizes power through unconstitutional means shall not be allowed to participate in the activities of the Union.⁹¹⁵ The Union has a variety of options on how to deal with an unconstitutional government, including imposition of sanctions.⁹¹⁶ The entrenchment of this right in Kenya's new Constitution is therefore a pointer to the country's commitment to upholding international standards of democracy, at least on paper. Hopefully, this commitment shall be translated into positive action to avert incidents of political turmoil such as the one that was experienced in the aftermath of the 2007 elections.

Freedom of movement and residence

Freedom of movement and residence in the context of the 2010 Constitution envisages the right to enter, remain and reside in and leave the country. Whereas the right to 'leave' the country extends

914 See Constitutive Act of the African Union, article 4(p).

915 As above, article 30.

916 Article 23 provides as follows: '2. ...any member state that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly.'

to ‘every person’, which may include aliens, the right to ‘enter, reside or remain anywhere’ in Kenya is a preserve for citizens.⁹¹⁷ The rationale for couching the provision in this language may have been to avert instances of expulsion or exiling of citizens for political or other reasons.

In practice, the right to freedom of movement has been liberally interpreted to the extent of illegitimizing civil jail. *In Re the Matter of Zipporah Wambui Mathara*,⁹¹⁸ the High Court declared the Civil Procedure Act provisions on civil jail unconstitutional noting that

A party who is deprived of their basic freedom by way of enforcement of a civil debt through imprisonment, their ability to move and even seek ways and means of repaying the debt is curtailed. [Emphasis added]

Imprisonment caused by inability to fulfill a contractual obligation is prohibited under international human rights law.⁹¹⁹ In Kenya, prior to this decision, although failure to fulfill a contractual obligation did not amount to a crime, it could, nevertheless, land a judgment-debtor into prison. The Civil Procedure Act provided for a framework where a person who is unable to pay his debt would be held in prison for as long as six months.⁹²⁰

Right to property

Every person has the right, either individually or in association with others, to acquire and own property of any description in any part of the country.⁹²¹ Although arbitrary deprivation of property is expressly prohibited,⁹²² the right to property does not extend to any unlawfully acquired property.⁹²³ Moreover, the State can deprive a person of property under certain exceptional circumstances, for example, if the acquisition is for a public purpose or is in public

917 Article 39(1) & (2).

918 [2010] eKLR.

919 Article 11, CCPR.

920 Order XXI, Rule 28 of the Civil Procedure Rules.

921 Article 40(1).

922 Article 40(2)(a).

923 Article 40(6).

interest.⁹²⁴ Such acquisition must be accompanied by prompt payment in full of just compensation to the affected person.⁹²⁵

To ensure that the power to encroach upon private property is not abused, there should be enabling statutory provisions that would require the State to adhere to the international law principles of payment of just and adequate compensation. For instance, the amount of compensation, time and manner of the payment must reflect an equitable balance between the public interest and the interests of those affected, with due regard to all relevant circumstances. Such circumstances should include, for example, the current use of the property; its history of acquisition and use; the market value of the property; the extent of direct State investment and subsidy in its acquisition and beneficial capital improvement; and the purpose of the encroachment. It would be more expedient if the time and manner of the payment is agreed to by those affected or in the alternative, decided or approved by a competent court of law.

It is noteworthy that the right to property as stipulated in the 2010 Constitution is not limited to the protection of land rights. Rather, the term ‘property’ should be taken to mean both movable and immovable property. This explains why article 40(5) extends this right to intellectual property. The provision obliges the State to ‘support, promote and protect the intellectual property rights’ of its people which position the Judiciary has demonstrated willingness to secure. In *Anne Nang’unda Kukali v Mary A Ogola and another*,⁹²⁶ the High Court gave injunctive orders restraining the respondent’s college, University of Nairobi, from awarding her a degree in Master of Arts on the basis of plagiarized research work originally conducted by the applicant in the course of pursuing a Master of Education programme at Maseno University. Justice FN Muchemi’s conclusion in this regard merits to be excerpted:

I am satisfied that the Applicant has shown that in the event of her original work being used by the first Respondent in her degree course approval, the Applicant *is likely to suffer substantial loss due to violation of her intellectual rights.*[emphasis added]

924 Article 40(3)(b).

925 Article 40(3)(b)(i).

926 [2010] eKLR.

Labour relations rights

The 2010 Constitution intends to promote fair labour relations and practices by guaranteeing both employees and employers the enjoyment of certain rights. Accordingly, every worker has the right to fair remuneration, reasonable working conditions, to form, join or participate in the activities or programmes of a trade union and to strike.⁹²⁷ On the other hand, every employer has the right to form, join and participate in the activities and programmes of an employers' organisation. The 2010 Constitution also safeguards the rights and interests of employers' organisations and trade unions. Some of the rights to be enjoyed by these organisations include the right to determine their own administration, programmes and activities; to organise, form and join federations; and to engage in collective bargaining.⁹²⁸

Arguably, the right to fair labour practices also precludes sexual harassment at the work place. This may be construed from the wording of article 41(2)(c), which guarantees the right to 'reasonable working conditions.' A working environment cannot be termed as reasonable if employees are subjected to sexual harassment and other related vices. The government is therefore expected to come up with suitable legislation and policies to prohibit vices that may render work conditions un-equitable and unsatisfactory.

Right to clean and healthy environment

In terms of article 42 of the 2010 Constitution, every person has the right to a clean and healthy environment. This includes the right to have the environment protected for the benefit of present and future generations. The right to a clean and healthy environment gears at maintaining an environment fit for human habitation that poses no, or minimum, threat to human life. Environmental conservation is very important in this respect. It is noteworthy that this right has both individual and collective dimensions.⁹²⁹ The individual dimension is the right of any victim or potential victim of an environmentally

927 Article 41(2)(a)-(d).

928 Article 41(4) & (5).

929 U Umzurike *The African Charter on Human and Peoples' Rights* (1997) 75.

damaging activity to obtain reparation for harm suffered, while the collective dimension imposes a duty on individuals and states to cooperate to resolve environmental problems.⁹³⁰

The right to a clean and healthy environment has in the recent past become very important and relevant to Africa as a whole. The importance culminated from the toxic waste dumping of 1988 in some African countries by international corporations.⁹³¹ After discovering the dumping, the former Organisation of African Unity (OAU) took quick action to forestall future occurrences. The same year, the OAU Council of Ministers passed a resolution condemning the import of toxic wastes to Africa, and emphasised that toxic dumping is a crime against Africa.⁹³² This resolution was followed by the adoption of the convention banning the importation of toxic waste into Africa.⁹³³

When implementing the right under review, it is imperative to note that the primary responsibility lies with the Government to adopt measures that will ensure effective environmental conservation and management. The 2010 Constitution augments this position when it imposes on the State the obligation to:

- (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
- (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
- (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
- (d) encourage public participation in the management, protection and conservation of the environment;
- (e) protect genetic resources and biological diversity;
- (f) establish systems of environmental impact assessment,

930 As above.

931 Nmehielle (n 817 above) 157.

932 'OAU Council of Ministers Resolution on Dumping of Nuclear and Industrial Waste in Africa', adopted at Addis Ababa, 23 May 1998. CM/Res. 1153 (XLVIII); (1989) 28 *International Legal Materials* 567.

933 Bamako Convention on the Ban of Importation into Africa and the Control of Transboundary Movement and Management of Hazardous Waste Within Africa; concluded at Bamako, 29 January 1991. (1991) 30 *International Legal Materials* 775.

- environmental audit and monitoring of the environment;
- (g) eliminate processes and activities that are likely to endanger the environment; and
- (h) utilise the environment and natural resources for the benefit of the people of Kenya.⁹³⁴

On the other hand, individuals have a duty to cooperate with the Government and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁹³⁵ In fact, the 2010 Constitution provides for mechanisms to redress any violations of the right to a clean and healthy environment. According to article 70(1):

If a person alleges that a right to a clean and healthy environment recognised and protected under article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

When addressing such claims, the court may make any order it considers appropriate to prevent or discontinue any act or omission that is harmful to the environment. It may also compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment. The court may also provide compensation for any victim of a violation of the right to a clean and healthy environment.⁹³⁶

At the pan-continental level, the findings and recommendations of the African Commission in *Social and Economic Rights Action Centre (SERAC) and another v Nigeria*⁹³⁷ (otherwise known as the ‘Ogoni case’ or ‘SERAC case’) bring out very pertinent issues on the right to a clean and healthy environment. The communication was brought on behalf of the Ogoni people, alleging that the military government of Nigeria had, among other provisions, violated article 21 of the African Charter (relating to the right to a clean

934 Article 69(1).

935 Article 69(2).

936 Article 70(2)(a)–(c), 2010 Constitution.

937 Communication 155/96, *Social and Economic Rights Action Centre (SERAC) and another v Nigeria*, Fifteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex V).

environment) by virtue of being directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC).⁹³⁸

It was the complainants' contention that, by disposing toxic wastes into the environment and local waterways, the oil consortium exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities. The consortium also allegedly neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air had serious short and long-term health impacts, including skin infections, respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.⁹³⁹ The African Commission noted that:

... despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of article 21 of the African Charter. ... Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligations under human rights instruments.⁹⁴⁰

The African Commission rightly suggested that, although the Nigerian Government had the right to produce oil to fulfil the economic and social rights of Nigerians as a whole, it equally had the duty to protect the interests of the Ogonis who were being affected by its activities. Hence, when a State allows private persons or groups to act freely and with impunity, it would be in violation

938 As above, para 1.

939 As above, para 2.

940 As above, para 57-58.

of its obligations to protect the human rights of its citizens. There is, therefore, an obligation on governmental authorities to take steps to make sure that private persons do not interfere with the enjoyment of the rights to a clean and healthy environment in spite of the economic gains brought about by their activities.

Economic, social and cultural rights

As a marked departure from what obtained in the repealed Constitution, the current one guarantees the protection of economic and social rights.⁹⁴¹ This is an indication that the new constitutional dispensation puts economic, social and cultural rights at par with other rights such as civil and political rights. Indeed, it is detrimental to dissociate economic and social rights from other categories of rights in their conception as well as enforcement. It must be understood that human rights are interrelated and indivisible.

It is highly expected that the most contentious issue on the 2010 Constitution's economic and social rights provisions will be their enforceability. For many decades, socio-economic rights have been regarded as secondary rights. Mbazira rightly noted that, 'civil and political rights are thought to be 'absolute' and 'immediate', whereas economic, social and cultural rights are held to be programmatic; to be realised gradually and therefore not to be 'real' rights.'⁹⁴² The argument that socio-economic rights are not justiceable is based on the conception that these rights require vast resources for their implementation. This view, however, is blind to the fact that not all socio-economic rights need to be implemented immediately.⁹⁴³

941 Articles 43 and 44, 2010 Constitution. Those listed under these provisions are the right to: the highest attainable standard of health, which includes the right to health care services, including reproductive health care; accessible and adequate housing, and to reasonable standards of sanitation; be free from hunger, and to have adequate food of acceptable quality; clean and safe water in adequate quantities; social security; education; emergency medical treatment; social security; language; and culture.

942 See C Mbazira 'A path to realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa's Development' (2004) 4 *African Human Rights Law Journal* 36. See also A Eide 'Economic, social and cultural rights as human rights' in E Eide, C Krause & A Rosas (eds) *Economic social and cultural rights: A text book* (2001) 10; K Arambulo *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights* (1999) 58.

943 As above.

Indeed, the CESCR attests to this fact by requiring states to ‘take steps to the maximum of [their] available resources, with a view to progressively achieving the full realisation of the rights.’⁹⁴⁴ Although the UN Committee on Economic, Social and Cultural Rights has said that some of the obligations are of immediate effect, this does not necessarily mean that States are compelled to do the impracticable.⁹⁴⁵ The argument on impracticability of enforcement of socio-economic rights is also blind to the fact that the enforcement of some civil and political rights may be equally impracticable. The right to life, for example, imposes an obligation on the state to provide security to its citizens. But this does not mean that murders are not committed. It is impracticable to provide every citizen with a police officer at his or her guard.⁹⁴⁶ One would therefore agree with Ankumah that economic, social and cultural rights are justiceable, but there is the need for their progressive realisation, taking into consideration the circumstances faced by individual states.⁹⁴⁷

Family related rights

Article 45 identifies the family as the natural and fundamental unit of society and the necessary basis of social order. The rights guaranteed to the family include the rights to marry⁹⁴⁸ and equality in marriage.⁹⁴⁹ Ideally, the right to marry is a preserve of persons of opposite sex, meaning that the 2010 Constitution does not sanction homosexual marriages. In practice however, there is a sense to which woman-to-woman marriages practiced under certain customary regimes may be recognized. In *Monica Jesang Katam v Jackson Chepkwony and another*,⁹⁵⁰ JB Ojwang J (as he then was) did not hesitate to protect the inheritance rights of a woman married to another under Nandi customary law, a juridical process that could

944 Article 2(1), ICESR.

945 Mbazira (n 942 above) 38. See also General Comment No 3 (Fifth session, 1990) [UN doc E/1991/23] ‘The nature of the states’ obligations’ (article 2, para 1 of the Covenant).

946 As above.

947 See Ankumah (n 872 above) 144.

948 Article 45(2).

949 Article 45(3).

950 [2011] eKLR.

have legitimized such practices. The judge found that the petitioner “was a ‘wife’, and, by the operative customary law, she and her sons belonged to the household of the deceased, and were entitled to inheritance rights, prior to anyone else”. The same sex marriage could therefore be read into the scheme of the *Law of Succession Act*,⁹⁵¹ placing the petitioner and her children in the first line of inheritance: the petitioner herself for being ‘wife of the deceased’, and her children for being the children of the deceased. Under these customary marriages:

A woman past the age of [among the Nandi and Kipsigis] child-bearing and who has no sons, may enter into a form of marriage with another woman. This may be done during the lifetime of her husband, but is more usual after his death. Marriage consideration is paid, as in regular marriage, and a man from the woman’s husband’s clan has intercourse with the girl in respect of whom marriage consideration has been paid. Any children born to the girl are regarded as the children of the woman who paid marriage consideration and her husband.⁹⁵²

A marriage will only be valid upon the ‘free consent of the parties’. This implies that the law does not recognize forced marriages.

Other than just casually stating that the family shall enjoy the recognition and protection of the State, the 2010 Constitution does not specify ways in which such protection could be afforded. It will not be enough for the State to create a legislative framework to secure family rights. It must, in addition, strive to create social conditions that would enable families to flourish, without necessarily compromising on their privacy. It has been proposed that the State could, for example, undertake special programmes geared towards training of families in order to help create a stable and positive environment in which children will be imparted with virtues and values.⁹⁵³

Consumer rights

Consumers have certain constitutional rights in relation to the purchase of goods and services. Article 46 of the Constitution enlists them as the right to:

951 Section 29, Chapter 160, Laws of Kenya.

952 E Cotran *The law of marriage and divorce* (1968) 117.

953 Nmehielle (n 817 above) 132.

- (a) goods and services of reasonable quality;
- (b) the information necessary for them to gain full benefit from goods and services;
- (c) the protection of their health, safety, and economic interests; and
- (d) compensation for loss or injury arising from defects in goods or services.

In Kenya, the rights of the consumer are enshrined in a number of Acts of Parliament, for example, the Sale of Goods Act.⁹⁵⁴ Some of these laws protect the consumer from misleading advertising, unfair contract terms and undue discrimination. It is rather unfortunate; however, that many consumers do not know of the existence of these rights and therefore feel that they have little power in the marketplace. This situation is exacerbated by consumers' lack of knowledge of their responsibilities. It is needless to mention that consumer rights are best safeguarded when consumers know and fulfill their responsibilities. Consumers must know that their protection is largely dependent on how well they meet their responsibilities.⁹⁵⁵ Consumers should take responsibility by, among other ways, shopping around for the best deals, knowing how to compare prices and quality and learning how and where to complain when they are not content with their goods and services.⁹⁵⁶

Justice related rights

The 2010 Constitution guarantees a number of justice related rights, including, the right to fair administrative action;⁹⁵⁷ access to justice;⁹⁵⁸ rights of arrested persons;⁹⁵⁹ right to fair hearing;⁹⁶⁰ and rights of persons detained, held in custody or imprisoned.⁹⁶¹ The common

954 Sale of Goods Act, Chapter 31, Laws of Kenya.

955 See Communications Commission of Kenya 'Consumer rights and responsibilities' available at http://www.cck.go.ke/consumers/consumer_protection/downloads/consumer_rights_and_responsibilitiesfull.pdf (accessed on 9 November 2010).

956 As above.

957 Article 47.

958 Article 48.

959 Article 49.

960 Article 50.

961 Article 51.

thread cutting across this cluster of rights is the emphasis that the justice system ought to be accessible, expeditious, efficient and procedurally fair. Exorbitant or unreasonable fees should therefore not impede access to justice.

Already, courts of law have made pronouncements on some of these entitlements. With respect to the rights of arrested persons ('to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released'),⁹⁶² the High Court has since declared section 123 of the Criminal Procedure Code, which foreclosed bail for arrested suspected capital offenders, unconstitutional arguing that:

In our Constitution it is stated expressly, positively and unequivocally that an arrested person has the right to be released on bond or bail on reasonable conditions pending a charge or trial. This means an accused must be released on bond or bail on reasonable conditions. The only exception or fetter to this right is that there must be 'compelling reasons not to be released'. The court must therefore exercise its discretion with this in mind...⁹⁶³

Bail/bond is thus a right at the disposal of all classes of arrested persons except for where there are 'compelling reasons' and the burden is on the prosecution to demonstrate the existence of such circumstances warranting the refusal of bail.⁹⁶⁴ According to Ibrahim J (as he then was), 'the primary consideration is whether the accused person [will] attend Court and be available at the trial'. Thus 'all factors, and facts and circumstances must be considered with this central principle in mind'.⁹⁶⁵

The Judiciary has equally upheld the rights of arrested persons [articulated under article 49(1)(f)]:

965

962 Article 49(1)(h).

963 *Republic v Danson Mgunya and another* [2010] eKLR.

964 As above.

965 See also JB Ojwang J (as he then was) in *Ali Mcheni Ali v Republic* [2011] eKLR where it is stated: '... the spirit of Ibrahim, J's Ruling, in my opinion, is that the several considerations are relevant to varying degrees, but they coalesce into the most crucial factor, namely, *whether or not the accused will come before the Court on the scheduled trial date*. This should be the basis for determining that there are "compelling reasons" for not granting bail/bond as contemplated under the Constitution'.

To be brought before a court as soon as reasonably possible, but not later than:

- (i) twenty-four hours after being arrested; or
- (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.

In *Purity Kanana Kinoti v Republic*,⁹⁶⁶ the High Court found that delay in bringing an arrested person before court beyond the stipulated 24 hours 'constituted a violation of her constitutional rights'. Ochieng J also ruled that given that in this case the delay in charging the accused before court was wholly attributable to the Police, and not the AG, the trial would still continue. Instead, the police officer that occasioned the delay was held liable to compensate the petitioner.

It is noteworthy that the 2010 Constitution has adopted international standards in its approach to the right to fair trial. For instance, it guarantees fair hearing, the right of appeal, presumption of innocence, defence by counsel of one's choice, trial by an impartial court or tribunal, individual criminal responsibility, and the prohibition of *ex-post facto* laws.

The 2010 Constitution also entrenches the right 'to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result'.⁹⁶⁷ It cannot be gainsaid, the right to legal aid and assistance is an integral component of fair trial as it ensures that indigent persons are not denied fair hearing due to their insufficient, or lack of means to hire competent Counsel. However, the provision of legal aid and assistance is a capital-intensive undertaking, which many developing states, including Kenya, have found very difficult to accomplish effectively from their own resources.⁹⁶⁸ A serious thought needs to be given to ways and means this right could be availed to indigent persons without compromising national resources that could otherwise have been utilised for development purposes.

966 eKLR.

967 Article 50(h).

968 See a similar argument in N Udombana 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa' (2006) 6 *African Human Rights Law Journal* 312.

Rights of special groups

The Bill of Rights has provisions specifically tailored to protect the rights of people falling within at least five groups, namely, children,⁹⁶⁹ persons with disabilities,⁹⁷⁰ youth,⁹⁷¹ minorities and marginalised groups,⁹⁷² and older members of the society.⁹⁷³ These could be said to be special groups of people who require preferential treatment owing to their vulnerability. Children, for example, are usually physically and emotionally vulnerable and need special support in order to fully enjoy their rights. They need family care and protection from abuse, neglect, forced labour, forced marriages, detention, among other concerns.

Due to this, the 2010 Constitution extends certain special rights to them, such as the right to: a name and nationality; free and compulsory basic education; basic nutrition, shelter and health care; be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour; parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and not to be detained, except as a measure of last resort.⁹⁷⁴

With regard to persons with disabilities, article 54 entitles them to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning; access educational institutions and facilities to the extent compatible with their interests; reasonable access to all places, public transport and information; use Sign language, Braille or other appropriate means of communication; and access materials and devices to overcome constraints arising from their disabilities.⁹⁷⁵ Moreover, the 2010 Constitution places an obligation on the State to ensure the progressive implementation of

969 Article 53.

970 Article 54.

971 Article 55.

972 Article 56.

973 Article 57.

974 Article 53(1)(a)–(f).

975 Article 54(1)(a)–(e).

the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.⁹⁷⁶

The Constitution could therefore rightly be understood to have fortified the Persons with Disabilities Act, 2003,⁹⁷⁷ which preceded it. According to the Preambular section of this law, the legislation is an Act of Parliament to provide for the rights and rehabilitation of persons with disabilities; to achieve equalization of opportunities for persons with disabilities; to establish the National Council for Persons with Disabilities; and for connected purposes.

The Act defines 'disability' as the physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapacity, which impacts adversely on social, economic or environmental participation. It defines 'discrimination' as according different treatment to different persons solely or mainly as a result of their disabilities and includes using words, gestures or caricatures that demean scandalize or embarrass a person with a disability.

The Act has eight parts. The first part contains the short title of the Act as well as the interpretative section. The second part creates an institution, National Council for Persons with Disabilities. This body is envisioned to be the main enforcement agency of the rights and privileges of persons with disabilities provided for under Part III of the Act. Part IV of the legislation provides for the civic rights of persons with disabilities while Part V establishes the National Development Fund for Persons with Disabilities. Part VI provides for relief and incentives for persons with disabilities, Part VII contains miscellaneous provisions while Part VIII creates various offences and provides for their respective penalties.

Clearly, this legislation signifies the first serious attempt to enact the human rights imperatives of persons with disabilities in Kenya. This seriousness is demonstrated by the fact that the Act provides for equalization of opportunities,⁹⁷⁸ the elimination of discrimination in

976 Article 54(2).

977 This legislation was published on 9 January 2004 and came into operation by virtue of Legal Notice number 64 of 16 June 2004.

978 Section 7(1)(b)(i).

order to ensure equality⁹⁷⁹ and rehabilitation of affected persons.⁹⁸⁰ Indeed, the protection afforded to persons with disabilities must go beyond providing them with suitable facilities, food and specialised medical care, to providing them with opportunities to engage in productive activities, commensurate with their abilities and consistent with their vocations or desires.⁹⁸¹

Additionally, States should ensure that disabled and old persons are able to access public places such as buildings and other social infrastructure. This is essential because, most public offices have not been designed to allow, for example, people on wheel chairs to access them. Public lavatories and streets in most Kenyan towns and cities do not have rumps, which may ease the movement of such persons. As a result, many rights – civil and political as well as socio-economic – of such persons are violated. For instance, their right to freedom of movement is significantly limited. The same could be said of their right to freedom of association in as far as they are impaired by such factors to associate with other members of the society. All in all, the Government should look for ways of facilitating the enjoyment of all the rights contained in the Constitution, to the fullest possible extent, by all the people, including the listed special groups.

Bill of Rights, as a collage of human rights

The 2010 Constitution defies the nomenclature of human rights into generations. Indeed, it is accurate to describe the new Bill of Rights as a collage of all generations and genres of human rights, a rare development in municipal law. In addition to the usual civil and political rights, it also carries social and economic rights like the right to the highest attainable standard of health,⁹⁸² right to accessible and adequate housing, and to reasonable standards of sanitation;⁹⁸³ right to be free from hunger, and to have adequate food of acceptable

979 Section 7(1)(b)(iv).

980 Section 7 (1)(b)(vi).

981 Nmehielle (n 817 above) 137.

982 Article 43(1)(a).

983 Article 43(1)(b).

quality;⁹⁸⁴ right to clean and safe water in adequate quantities;⁹⁸⁵ right to benefit from social security;⁹⁸⁶ and the right to education.⁹⁸⁷ As noted above, there is further protection of environmental rights in addition to other special and specific rights of children, youth, women, and the elderly, amongst others. Provision is also made for consumer rights setting the Bill of Rights apart from many others.

According to a traditional categorization of human rights, often ascribed to the French jurist Karel Vasak,⁹⁸⁸ human rights unveiled at different epochs along the three-dimensional call of the French revolution, to wit, *liberte*, *egalite*, and *fraternite*.⁹⁸⁹ First to arise were what are now called ‘first generation’ rights. They are also referred to as civil and political rights. There then emerged ‘second generation’ rights, or social and economic rights. The human rights discourse, according to this dichotomy, has lately witnessed yet another facet of entitlements termed ‘group’, ‘solidarity’ or ‘third generation’ rights. The Bill of Rights also contains other special rights mentioned above including those relating to gender equality. These later rights are proper candidates for the ‘fourth generation’ class. All these categories collectively grace the Bill of Rights, which is seldom for municipal constitutions. The rights could be enjoyed individually (individuals’ rights) or collectively (group or collective rights).

Noteworthy, while civil and political rights mostly impose restraints on the exercise of State power and are therefore ‘negative’ rights, socio-economic rights tend to extend the scope of State activities, translating them into ‘positive’ rights.⁹⁹⁰ Therefore, the inclusion of all generations of human rights in the Bill of Rights underscores the fact that one category of rights cannot

984 Article 43(1)(c).

985 Article 43(1)(d).

986 Article 43(1)(e).

987 Article 43(1)(f).

988 The categorization of rights into generations is often ascribed to Karel Vasak. See this classification in, for example C Aka ‘Military, globalisation and human rights in Africa’ (2002) *New York Law School Journal of Human Rights* 371.

989 Viljoen (n 114 above) 6.

990 W Eno ‘The African Commission on Human and Peoples’ Rights as an instrument for the protection of human rights in Africa’ (1998) *LLM Thesis University of South Africa* 7.

survive without the other. This development is in line with the prevailing wisdom that claims that human rights are interrelated, interdependent, interconnected and equal in status.⁹⁹¹

Bill of Rights, with an expansive ‘non-discrimination clause’

Discrimination (in the new Bill of Rights) is prohibited, whether directly or indirectly, on the grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.⁹⁹² This menu is broad when compared to the repealed Constitution which only listed race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex⁹⁹³ as grounds the basis upon which discrimination was not permitted. It curiously omitted the very crucial grounds of pregnancy, marital status, health status, age, disability, conscience, belief, and dress amongst others. Liberal critics may however, still fault the new Bill of Rights’ non-discrimination cause for not including ‘sexual orientation’ as is the case in South Africa.⁹⁹⁴

Litigating the non-discrimination clause may present problems especially where the litigant(s) claim(s) to be differentiated on the basis of a ground not expressly listed. Such a case may beg the questions: are the grounds listed under the ‘non-discrimination clause’ exhaustive? Are there other possible areas of discrimination not anticipated but which qualify for protection? Most certainly, these are pertinent questions to be determined by superior courts of record preferably by way of development of progressive jurisprudence. Judicial officers confronted with these issues may take cue from South Africa’s Constitutional Court, which as a matter of principle does not condone differentiation of any kind on the listed grounds ‘unless it is established that the discrimination is fair’.⁹⁹⁵ But where the distinction is not listed, the Constitutional Court takes the differentiation in question through a rigorous fairness test. The

991 See article 5 of the Vienna Declaration and Programme of Action.

992 Article 27(4) and (5).

993 Section 70 and 82(3), repealed Constitution.

994 See article 9, SA Constitution.

995 See article 9(5), SA Constitution.

stages entailed in such an enquiry were enumerated in *Harksen v Lane NO*⁹⁹⁶ in the following terms:⁹⁹⁷

- (a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
 - (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(3) and (4).
- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.

⁹⁹⁶ *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 53.

⁹⁹⁷ Currie & De Waal (n 36 above) 235.

Bill of Rights, with regard for substantive equality

As is already explicit, it is now accepted principle that the law should treat all human beings equally.⁹⁹⁸ However, even with laws and policies that provide for equality and non discrimination per se it is still possible that inequalities could thrive in the given society. This is because persons are stationed differently and certain further remedial measures may be required to attain real equality. For example, despite express recognition of gender equality, women are hardly equal to men due to traditional, cultural, and even legal distinctions, which have conventionally perpetrated the subordination of the female gender. Structurally reinforced practices such as patriarchy and capitalism have traditionally led to an unequal status for the sexes. Thus, certain measures are called for to bring women and men at par before (or as) usual equality procedures are implemented. Often, the measures preferred take the form of affirmative action. Affirmative action measures could also be useful in the amelioration of other sections of society such as ethnic or racial minorities who have suffered past discrimination and prejudices.

These factors impel that the concept of equality be broken down into two: procedural and substantive equality. Procedural or formal equality implies that all sectors of society be treated equal in procedures and means. It means sameness of treatment.⁹⁹⁹ With respect to legislation, 'the law must treat individuals in like circumstances alike'.¹⁰⁰⁰ Procedural equality does not dig deeper to understand the society itself or the various stations occupied by the actors upon whom the equality provisions have to be exerted. Procedural equality might provide, for example, that 'both men and women have equal chance to vie for political office'. It may not go further to address circumstances such as gender-based violence, patriarchy and women's economic subordination that might hinder their full realization of equal political rights.

On the other hand, substantive equality seeks to ensure that equality provisions have impact – both de jure and de facto. It

998 See, for instance, S Skogly 'Article 2' in G Alfredsson & A Eide (eds.) *The universal declaration of human rights: A common standard of achievement* (1999) 75.

999 Currie & De Waal (n 36 above) 232.

1000 As above.

‘requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal’.¹⁰⁰¹ Substantive equality emanates from the philosophy that justice is attained when equals are treated equally and injustice when unequal are treated in like manner. Substantive equality reckons, for instance, that while equal educational opportunities might be constitutionally granted, there could be further need to address the underlying cultures and limitations that may hinder girl child’s access to education. Thus, substantive equality would insist on affirmative action and other programmes such as social engineering to change society’s perception about girl education. In other words, it

Requires an examination of the actual social and economic conditions of groups and individuals in order to determine whether the Constitution’s commitment to equality is being upheld. The results or effects of a particular rule are highlighted rather than its mere form.¹⁰⁰²

This approach is salient throughout the 2010 Constitution. As an overarching principle, the Bill of Rights obliges the State to take legislative and other measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.¹⁰⁰³ Similarly, the State is required to take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.¹⁰⁰⁴ Other constitutional measures aimed at substantive equality include the provision for:

- (a) Affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life.¹⁰⁰⁵
- (b) An electoral system that complies with *inter alia* the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender as

1001 Currie & De Waal (n 36 above) 233.

1002 As above.

1003 Article 27(6).

1004 Article 27(8).

1005 Article 56.

- well as fair representation of persons with disabilities.¹⁰⁰⁶
- (c) Party lists comprising an appropriate number of qualified candidates and which alternates between male and female candidates in the priority in which they are listed; and except in the case of county assembly seats, each party list ought to reflect the regional and ethnic diversity of the people of Kenya.¹⁰⁰⁷
 - (d) Respect, by every political party, of the right of all persons to participate in the political process, including minorities and marginalised groups.¹⁰⁰⁸
 - (e) Respect and promotion of human rights and fundamental freedoms and gender equality and equity¹⁰⁰⁹ by every political party.
 - (f) The membership of forty-seven women¹⁰¹⁰ and twelve members representatives of special interests (including the youth, persons with disabilities and workers)¹⁰¹¹ in the National Assembly.¹⁰¹²
 - (g) The nomination of sixteen women members to Senate¹⁰¹³ and two further members, being one man and one woman, representing the youth,¹⁰¹⁴ in addition to the nomination of two members, being one man and one woman, representing persons with disabilities.¹⁰¹⁵
 - (h) The enactment of legislation to promote the representation in Parliament of – (a) women; (b) persons with disabilities; (c) youth; (d) ethnic and other minorities;

1006 Article 81.

1007 Article 90(2).

1008 Article 91(1)(e).

1009 Article 91(1)(f).

1010 Article 97(1)(b).

1011 Article 97(1)(c).

1012 These members are in addition to two hundred and ninety members, each elected by the registered voters of single member constituencies and the Speaker, who is an *ex officio* member– see article 97(1)(a) & (d).

1013 Article 98(1)(b).

1014 Article 98(1)(c).

1015 Article 98(1)(d). Other members of the Senate are: forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency and (e) the Speaker, who shall be an *ex officio* member – article 98(1)(a) & (e).

- and (e) marginalised communities.¹⁰¹⁶
- (i) The appointment of at least four women to the Parliamentary Service Commission.¹⁰¹⁷
 - (j) The representation of both genders in the JSC.¹⁰¹⁸
 - (k) The promotion of gender equality in judicial service.¹⁰¹⁹
 - (l) A devolved system of government aimed *inter alia* at protecting and promoting the interests and rights of minorities and marginalised communities.¹⁰²⁰
 - (m) County governments reflecting *inter alia* the principle that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.¹⁰²¹
 - (n) Special seats necessary to ensure that no more than two-thirds of the membership of the respective county assembly is of the same gender.¹⁰²²
 - (o) The inclusion in county assemblies of a number of members of marginalised groups, persons with disabilities and the youth as prescribed by an Act of Parliament.¹⁰²³
 - (p) None inclusion of more than two-thirds of the members of any county assembly or CEC from the same gender.¹⁰²⁴
 - (q) The requirement for the enactment of legislation to prescribe mechanisms to protect minorities within counties.¹⁰²⁵
 - (r) The principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya.¹⁰²⁶

These and similar stipulations have put Kenya in key with international human rights standards such as the Convention on

1016 Article 100.

1017 Article 127(2)(c)(i), (ii) & (d).

1018 Article 171(2)(d), (f) & (h).

1019 Article 172(2)(b).

1020 Article 174(e).

1021 Article 175(c).

1022 Article 177(1)(b).

1023 Article 177(1)(c).

1024 Article 197(1).

1025 Article 197(2)(b).

1026 Article 150(4).

the Elimination of All Forms of Discrimination Against Women (CEDAW) which, for instance, allows for temporary special measures ('affirmative action') to accelerate the achievement of equality in practice between men and women,¹⁰²⁷ and actions to modify social and cultural patterns that perpetuate discrimination 'with the view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or the stereotyped roles for men and women'.¹⁰²⁸

Bill of Rights that saves certain rights from derogation

The rights enshrined in the 2010 Constitution may be derogated from with the exception of the right to freedom from torture and cruel, inhuman or degrading treatment or punishment; the right to freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus*.¹⁰²⁹ This exclusion of certain rights from derogation, aside from being a unique landmark in Kenya's constitutional history, is also controversial. Generally speaking, the idea of derogation from human rights during emergencies is not inconsistent with international human rights law. Under the framework of the CCPR,¹⁰³⁰ for example,

[D]erogations are allowed, but States are also required to immediately inform the UN Secretary-General of the provisions from which they have derogated and the reasons for their derogation. A similar communication must be made when the derogation ends.¹⁰³¹

Being party to this instrument, and international law having the force of law locally,¹⁰³² these requirements should be applicable in Kenya.

Regrettably however, the rights saved from exclusion under the new Bill of Rights are fewer and inexhaustive. The right to

1027 Article 4.

1028 Article 5.

1029 Article 25.

1030 Kenya acceded to the CCPR on 1 May 1972.

1031 Viljoen (n 114 above) 251; also article 4(3).

1032 Article 2(5) & (6).

life;¹⁰³³ the right not to be subjected to retroactive penal laws and the right to freedom of conscience and religion are not exempted from derogation as required by the CCPR.¹⁰³⁴ South Africa, also a party to the CCPR, constitutionally protects more human rights from derogation, namely:¹⁰³⁵ the right to equality,¹⁰³⁶ right to human dignity, right to life, right to freedom and security of person,¹⁰³⁷ right to protection from slavery, servitude and forced labour,¹⁰³⁸ certain rights of children¹⁰³⁹ and rights of arrested, detained and accused persons.¹⁰⁴⁰

Further, the above provisions of the Bill of Rights put it at odds with the African human rights system and particularly the African Charter, which is applicable to Kenya. Although the main regional instrument 'the African Charter is silent on the effect of the suspension or derogation of rights',¹⁰⁴¹ its treaty body, the African Commission, has made it clear that,

The African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.¹⁰⁴²

1033 Judge Emukule in *Republic v John Kimita Mwaniki* [2011] eKLR, was stunned that: 'Strangely also, life is not one of those fundamental rights which may not be limited under section 25 of the Constitution'.

1034 Under article 4(2) of the CCPR the right to life; the prohibition on torture, slavery, forced labour, application of retroactive penal laws and the right to freedom of conscience and religion may under no circumstances be derogated from.

1035 See, article 37(5).

1036 The right is non-derogable with respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.

1037 The right is protected with respect to subsections 1(d) and (e) and (2)(c) of article 12.

1038 The right is protected with respect to slavery and servitude.

1039 The following subsections of article 28 are protected (1)(d) and (e); 1(g)(i) and (ii) and 1(i) with respect of children of 15 years and younger.

1040 The following subsections of article 35 are protected: (1)(a), (b) and (c); 2(d); (3) (a) to (o), excluding (d); (4) and (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

1041 Viljoen (n 114 above) 251.

1042 Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, para 21.

The African Commission has also held that ‘the suspension of the Bill of Rights does not *ipso facto* mean the suspension of the domestic effect of the Charter’.¹⁰⁴³ The apparent contradictions at both municipal and international levels may pose challenges especially during review of the State by the relevant treaty bodies as well as in the course of litigating the Bill of Rights. An appropriate compromise, perhaps, would be to hold that while the 2010 Constitution permits the derogation from certain rights in particular contexts, the State has further international obligations not to derogate from certain more rights at the global level¹⁰⁴⁴ and ultimately it is disallowed to derogate from almost all human rights at the regional level. After all, any legislation enacted in consequence of a declaration of a state of emergency has to be consistent with the Republic’s obligations under international law applicable to a state of emergency.¹⁰⁴⁵

Overall, in the event that certain rights are suspended in accordance with the 2010 Constitution, there is room to hold the State accountable for slightly more non-derogable rights under the CCPR and for all the rights provided for in the African Charter. State organs, officers and individuals are answerable, at the municipal level, for the Bill of Rights and the State is responsible internationally and regionally for her respective obligations. Needless to mention, resort to derogation should be discouraged even in extreme cases of emergency.

Bill of Rights that carries special regulation of emergencies

Seldom, situations arise in the life of a nation that seriously threatens its security or stability.¹⁰⁴⁶ In response, a government may legitimately declare a state of emergency and make emergency regulations designed to counter the danger.¹⁰⁴⁷ The *African Conference*

1043 See Gambian Coup case as cited in Viljoen (n 114 above) 252.

1044 As discussed above, the CCPR bars States from derogating from more rights than those reserved in the Bill of Rights.

1045 Article 58(6)(a)(ii).

1046 Hatchard, Ndulo & Slinn (n 81 above) 276.

1047 As above.

on the Rule of Law¹⁰⁴⁸ suggested that emergency measures should be invoked only where regular operations of authority are impossible. So long as a situation exists where authorities can operate and the problems arising can be overcome, a state of emergency may not be declared. In addition, the Conference resolved that emergency measures should be exceptional only lasting the duration of the national threat. Even more crucial, the reasons for the emergency must be clearly articulated.

Sufficient safeguards have been taken in the regulation of emergencies. For instance, although the declaration of a state of emergency may justify the limitation of human rights, this is only to the extent that the limitation is strictly required by the emergency and the legislation under which the limitation is hinged is consistent with the Republic's obligations under international law applicable to a state of emergency. The Bill of Rights makes it clear that no limitation shall take effect until it is published in the *Gazette*.¹⁰⁴⁹

Efforts are also made to ensure that emergency situations occur rarely and are short-lived if they have to happen. A state of emergency may be declared only when the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and the declaration is necessary to meet the circumstances for which the emergency is declared.¹⁰⁵⁰ Such declaration only applies prospectively for no longer than 14 days.¹⁰⁵¹ The National Assembly may however extend this period but only on attaining special majorities.¹⁰⁵²

As an additional measure, the Supreme Court has jurisdiction to decide on the validity of a declaration of a state of emergency, any extension of a declaration of a state of emergency and any legislation enacted, or other action taken, in consequence of a declaration of a

1048 See African Conference on the Rule of Law 1961 Report on the Proceedings (page 162) as cited in Hatcher, Ndulo & Slinn (n 81 above) 276.

1049 Article 58(6).

1050 Article 58(1).

1051 Article 58(2).

1052 Article 58(4). The first extension of the declaration of a state of emergency requires a supporting vote of at least two-thirds of all the members of the National Assembly, and any subsequent extension requires a supporting vote of at least three-quarters of all the members of the National Assembly.

state of emergency.¹⁰⁵³ A further safeguard is that a declaration of a state of emergency, or legislation enacted or other action taken in consequence of any declaration may not permit or authorise the indemnification of the State, or of any person, in respect of any unlawful act or omission.¹⁰⁵⁴

Bill of Rights espousing a conservative strain of moral philosophy

A notable attribute of the new Bill of Rights is its high regard for morality and the natural law philosophy. For instance, in a most controversial way, it is stipulated that the life of a person begins at conception.¹⁰⁵⁵ This resolution is both intricate and delicate for it excites very sensitive discourses especially in the areas of jurisprudence and reproductive health rights. During the deliberations that eventually resulted in the Convention on the Rights of the Child (CRC), for example, the Holy See had made the case for reference to the unborn child in defining who a ‘child’ is. Using this approach, the definition of the child would encompass ‘before as well as after birth’. In the end, narrates Veerman,

It was stated that since national legislation on the question of abortion differed greatly, the Convention could only be widely ratified if it did not take sides on the issue.¹⁰⁵⁶

However, this position may not have settled the controversy given that the Preamble to the Treaty carries the very position the Holy See had championed. The relevant preambular section (paragraph 9) reads:

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”.

1053 Article 58(5).

1054 Article 58(7).

1055 Article 26(2).

1056 PE Veerman *The rights of the child and the changing image of childhood* (1992) 185.

As expected, ‘most people now interpret the Preamble as a statement against abortion’.¹⁰⁵⁷ In fact, the Holy See itself has expressed confidence that the 9th preambular paragraph will serve as the perspective through which the rest of the Convention will be interpreted.¹⁰⁵⁸ Kenyans by dint of the 2010 Constitution have heeded this religious and moral call.

It is further important to note that although the Bill of Rights, while emulating South Africa’s Constitution,¹⁰⁵⁹ prohibits discrimination on an exhaustive list of grounds; it curiously leaves out only the ground of ‘sexual orientation’. Sexual orientation is not one of the protected grounds leaving it open to the view that there is no room for same sex relationships in the legal system. Another example of morally cautious provision is article 45(2) granting every adult the right to marry only a person of the opposite sex, based on the free consent of the parties.

Bill of Rights with centralized general limitation clause

As noted above, the Bill of Rights in the repealed Constitution was often criticized for belaboring the limitations of human rights more than it guaranteed the entitlements. Human rights would be limited in two major ways: by way of internal limitations assigned to particular rights; and through a general limitation clause which stated that human rights could be limited for the sake of greater interests of public health, security and morality. These provisions were often utilized to defeat the realisation of human rights. But the anomaly has since been corrected. With the exception of three human rights – right to property, right to freedom of the media and the right to freedom of expression – the new Bill of Rights does not make use of internal limitations or ‘claw back clauses’. This leaves the limitation of all human rights to be operated by one general and arguably progressive clause:

- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is

1057 Veerman (n 1056 above) 186.

1058 Holy See ‘interpretative declaration’ declaration under the CRC.

1059 See article 9(3), SA Constitution.

reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (i) the nature of the right or fundamental freedom;
- (ii) the importance of the purpose of the limitation;
- (iii) the nature and extent of the limitation;
- (iv) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (v) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.¹⁰⁶⁰

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom:

- (i) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
- (ii) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
- (iii) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service:

¹⁰⁶⁰ Contained at article 24(1) of the Constitution.

- (a) Article 31 – Privacy;
- (b) Article 36 – Freedom of association;
- (c) Article 37 – Assembly, demonstration, picketing and petition;
- (d) Article 41 – Labour relations;
- (e) Article 43 – Economic and social rights; and
- (f) Article 49 – Rights of arrested persons.

Six important points could be noted about the general limitation clause.¹⁰⁶¹ First, that it provides for limitation of the Bill of Rights only by way of law.¹⁰⁶² Thus, limitations by executive or military decrees or other extra-judicial devices have no place in the new legal dispensation.

Second, that where a limitation is sanctioned by law, it has to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account, inter alia: the nature of the right or fundamental freedom; the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.¹⁰⁶³ This exercise is a balancing act of which it was stated:

In the balancing process the relevant consideration will include that nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.¹⁰⁶⁴

1061 Contained at article 24, 2010 Constitution.

1062 Article 24(1).

1063 Article 24(1).

1064 *S v Makwanyane and another* 1995 3 SA 391 (CC) 104. The phraseology in article 24(1) is adopted entirely from article 36(1) of the Constitution of South Africa. Jurisprudence on it from South African courts especially the Constitutional Court is therefore imperative.

Third, human rights cannot be limited by inference or implication. Legislation limiting the Bill of Rights must specifically and expressly state the intention to limit a particular right or fundamental freedom as well as the nature and extent of the limitation in question.¹⁰⁶⁵ Despite this, legislation may limit the application of certain stipulated rights and fundamental freedoms¹⁰⁶⁶ to persons serving in the KDF or the National Police Service.¹⁰⁶⁷

Fourth, it is required that no limitation goes so far as to derogate from the core or essential content of the right in question.¹⁰⁶⁸

Fifth, the burden of demonstrating, before courts, tribunals and other authorities, that a limitation meets the above requirements is vested with the State or person(s) justifying the limitation¹⁰⁶⁹ and not the individual(s) or group(s) entitled to a particular right.

Finally, perhaps in appreciation of the fact that the quite global human rights may not always be palatable to all sections of society, the 2010 Constitution concedes that the provisions on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.¹⁰⁷⁰ This qualification may be justified because, as cultural relativists argue, global human rights standards that greatly influenced the new Bill of Rights often fail to take into consideration that each region has its own unique rights problems or priorities. Consequently, 'regional specificities often are the victims in processes of universal consensus-seeking'¹⁰⁷¹ and the provision under investigation could be understood as an effort towards a practical cultural equilibrium.

1065 Article 24(2)(a) – (b).

1066 Right to privacy; right to freedom of association; right to assembly, demonstration, picketing and petition; labour relations rights; economic and social rights; and rights of arrested persons.

1067 Article 24(5).

1068 Article 24(2)(c).

1069 Article 24(3).

1070 Article 24(5).

1071 Viljoen (n 114 above) 262.

Bill of Rights with both vertical and horizontal application

A bill of rights customarily regulates the ‘vertical’ relationship between the individual and the state.¹⁰⁷² Usually, this is an unequal relationship in which

The state is far more powerful than any individual. It has a monopoly on the legitimate use of force within its territory. State authority allows the state to enforce its commands through the criminal law. If not protected by a Bill of Rights against abuse of the state’s powers, the individual would be in an extremely vulnerable position.¹⁰⁷³

It is therefore quite natural for Kenya’s Bill of Rights to bind all State organs.¹⁰⁷⁴ What may not be conventional is the ‘horizontal’ application of the Bill of Rights whereby all persons¹⁰⁷⁵ are bound. Thus, both State authorities as well as private individuals are expected to fulfill their part otherwise they could be held liable for their respective violations. Already, in *Purity Kanana Kinoti v Republic*,¹⁰⁷⁶ a police officer found individually responsible for violations of an accused person’s human rights was held to be liable to compensate his victim. This means horizontal application is real and the State is no longer the only direct duty-bearer.

Bill of Rights with a viable enforcement apparatuses

In the last two decades, states appear to have developed interest in complementing the traditional organs of state (executive, legislature and judiciary) ostensibly to secure more protection for human rights.¹⁰⁷⁷ The bodies that have emerged to buttress the bulwark of human rights enforcement mechanisms have taken the form of human rights commissions, ombudsmen offices or more specialised institutions, for instance, on racial discrimination or gender equality.

1072 Currie & De Waal (n 36 above) 43.

1073 As above.

1074 Article 20(1).

1075 Article 20(1). “Person” under article 260 of the Constitution includes a company, association or other body of persons whether incorporated or unincorporated.

1076 eKLR.

1077 See, AE Pohjolainen *The evolution of national human rights institutions: The role of the United Nations* (2006) 2.

It is not uncommon to find hybrid bodies exhibiting a mixture of these traits. Indeed, Reif defines national human rights institutions (NHRIs) as ombudsmen, human rights commissions or hybrid human rights ombudsmen.¹⁰⁷⁸ It has been possible to compare and contrast these classes of bodies:¹⁰⁷⁹ The institutions have similar characteristics; neither institution is judicial in nature nor has law-making abilities. Rather, both institutions play an on-going advisory role regarding human rights matters, at both the national and international levels. The main difference between the institutions is that an ombudsman's primary role is to monitor human rights abuses perpetrated by government entities, while a human rights commission generally addresses the actions of private entities and individuals as well as government conduct.

The human rights enforcement mechanism which the 2010 Constitution articulates (in addition to courts) is a NHRI, the Kenya National Human Rights and Equality Commission.¹⁰⁸⁰ The functions assigned the Commission are:

- (a) to promote respect for human rights and develop a culture of human rights in the Republic;
- (b) to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development;
- (c) to promote the protection, and observance of human rights in public and private institutions;
- (d) to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs;
- (e) to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated;
- (f) on its own initiative or on the basis of complaints, to investigate or research a matter in respect of human rights, and make recommendations to improve the functioning

1078 LC Reif 'Building democratic institutions: The role of national human rights institutions in good governance and human rights protection' (2000) Spring *Harvard Human Rights Journal* 2.

1079 Tsekos (n 294 above) 21.

1080 Article 59, 2010 Constitution.

of State organs;¹⁰⁸¹

- (g) to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights;
- (h) to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;
- (i) to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct;
- (j) to report on complaints investigated under its mandate and to take remedial action; and
- (k) to perform any other functions prescribed by legislation.

Exercising the latitude given to it by article 59(4) of the 2010 Constitution, which provides that legislation may restructure the aforementioned Commission into two or more separate commissions, Parliament has established all the categories of NHRIs discussed above – a human rights commission, Kenya National Commission on Human Rights (KNCHR);¹⁰⁸² an ombudsman, the Commission on Administrative Justice (CAJ)¹⁰⁸³ and a specialised gender equality commission, the National Gender and Equality Commission.¹⁰⁸⁴

1081 Article 59(2).

1082 Established by the Kenya National Commission on Human Rights, Act number 14 of 2011.

1083 Established by the Commission on Administrative Justice Act, number 23 of 2011.

1084 Established by the National Gender and Equality Commission Act, number 15 of 2011.

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MORRIS KIWINDA MBONDENYI

AND

JOHN OSOGO AMBANI

THE NEW CONSTITUTIONAL LAW OF KENYA: PRINCIPLES, GOVERNMENT AND HUMAN RIGHTS

On 27 August 2010, a new Constitution for Kenya was promulgated. The Constitution seeks to re-orient the country by establishing a robust dispensation for good democratic governance amenable to the exercise of human rights. This book is tailored to unveil to the reader the fundamental normative and institutional frameworks of Kenya's new Constitution. Not only does it define key concepts in constitutional law, generally, it also details how government in Kenya has been restructured and re-organised to give effect to the traditional principles that form the basis of constitutional law.

The golden thread that cuts across the various chapters of the book is the emphasis that good constitutions anchor certain tenets that have garnered recognition as hallmarks of democratic dispensation. These hallmarks include the concept of separation of powers; the doctrine of the rule of law; constitutionalism and human rights. These attributes have largely been secured by the 2010 Constitution. Thus, this book is expected to contribute to this new promise by making knowledge on the Constitution accessible through breaking down and contextualising its provisions. It is certain to be useful to law and government students, lawyers, researchers and other persons who seek to understand the new constitutional order.

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